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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

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Appellants, Marvin Mandel, Governor of Maryland, et al., respectfully pray for either summary reversal of the decision below or for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINION BELOW

The District Court issued its opinion on May 17, 1976. The opinion has not yet been reported but is reprinted at pages 1a to 13a of the Appendix.

JURISDICTION

On April 30, 1976, Appellees filed suit in the United States District Court for the District of Maryland,

alleging deprivation of their constitutional rights by operation of various provisions of Maryland's election law. Jurisdiction was alleged under 28 U.S.C. § 1331 and 28 U.S.C. § 2201. Because an injunction was sought against the operation of portions of Maryland statutory law, application was made for the convening of a three-judge district court under 28 U.S.C. § 2281. On April 30 the district judge to whom application was made entered an order preserving the status quo, a three-judge panel was duly convened, and on May 12 evidence was taken and argument was heard. The Court filed its opinion on May 17 and on June 2 issued its final order granting Appellees declaratory and injunctive relief. (See Appendix pp. 14a-16a). Notice of Appeal to this Court was filed on June 4, 1976 in the District Court (See Appendix pp. 16a-19a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1253.

STATUTES INVOLVED

The principal statute involved is Maryland Code (1976 Replacement Volume) Article 33, § 7-1(e). Also relevant are the remaining provisions of § 7-1 and certain portions of Article 33, §§ 4A-1, 4A-3 and 5-2. These statutory provisions are reprinted at pp. 19a-23a of the Appendix.

QUESTIONS PRESENTED

(1) Whether the District Court erred in examining in isolation the deadline under Maryland law for filing nominating petitions in a Presidential election year (seventy days before the primary election) without considering the other elements of Maryland's system of gaining a place on the general election ballot?

(2) Whether the District Court erred in holding that the statutory deadline, standing by itself, constitutes an

unconstitutional denial of Appellee Bradley's right to obtain a place on the general election ballot and of the other Appellees' asserted right to have the candidate's name appear on that ballot?

(3) Whether the District Court erred in concluding that the summary disposition principles articulated in *Hicks v. Miranda,* 422 U.S. 332 (1975) required it to adopt the precise reasoning of the lower court's opinion in *Salera v. Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd summarily sub nom., Tucker v. Salera,* ___ U.S. ___ 96 S. Ct. 1451 (1976) and relieved it of its duty to distinguish and harmonize prior summary affirmances and written decisions of this Court?

STATEMENT OF THE CASE

With full knowledge of the strong field of party candidates from which his likely general election opponents were to come, Appellee Bruce Bradley, in the spring of 1975, began to weigh the possibility of running as an independent candidate in Maryland for the United States Senate in 1976. In the fall of 1975 Bradley and his supporters began circulating petitions to obtain the necessary signatures for him to appear on the 1976 general election ballot in Maryland. Needing 51,155 signatures to qualify (3 percent of the State's registered voters determined as of four months before the primary), Bradley submitted 53,239 signatures to the local election boards for validation on March 8, 1976. On the same date — the filing deadline for all State candidates including those campaigning in the party primaries — he filed a certificate of candidacy for the Senate seat. This filing deadline is fixed by law at 70 days before the primary election and occurs in early July (approximately 120 days before the general election) in non-Presidential election years and in early

March (approximately 230 to 240 days before the general election) in years when voters make their nomination selections in a May Presidential Preference Primary.

Following the normal signature verification process, the State Administrative Board of Election Laws notified Bradley on April 15, 1976 that his petition papers contained only 42,049 valid signatures and were thus insufficient to gain him a place on the general election ballot. Signatures had been invalidated for various reasons, many having been offered by persons not registered to vote, or by persons who did not reside in the county indicated on the petition sheet, or by persons who had previously signed the petition.

On April 30 Bradley and various supporters who alleged only their status as petition signators or persons desirous of having the candidate's name on the general election ballot filed suit in the United States District Court for the District of Maryland. Appellees contended that their constitutional rights had been violated in the following respects:

> 1. The remoteness of the early March candidate filing date from the date of the general election, standing by itself, placed an "unconstitutionally heavy burden" on Bradley's ability to be nominated by petition in a Presidential election year and thus restricted his First Amendment right of political association, "unconstitutionally impacted the Plaintiffs' right to vote" by unduly limiting the number of potential candidates for elective office and violated the Equal Protection Clause of the Fourteenth Amendment in that party primary candidates need not comply with the petition requirement while "independent candidates must comply with the unnecessarily burdensome requirement of filing nominating petitions at a date far removed from the date of the general election".

> 2. Various provisions of Section 7-1 of Article 33 of the Maryland Code, such as the typed or printed name requirement and the one county per petition sheet requirement, when coupled with the alleged lack of uniformity in county signature validation procedures and the respective boards' actions in conducting their regular voter list purges and voter registration drives "exacerbate . . . the remoteness of the filing date from the general election" so as to constitute a "totality of circumstances" violative of Appellees' rights of association and equal protection.

At the hearing before the three-judge panel, Appellees introduced affidavit testimony designed to show that Appellee Bradley encountered difficulties in his efforts to appear before various organizations prior to the filing deadline, with several indicating that he might appear later with other candidates running in the primary election. This testimony also pointed to the alleged difficulties inherent in circulating petitions in winter weather and during the Thanksgiving and Christmas holiday seasons. Finally, Appellee Bradley's affidavit indicated difficulty in approaching potential petition signers far in advance of the general election when the issues which were then current might not be the most important issues in November. While Appellees premised their constitutional attack on the 70 day pre-primary deadline solely on its remoteness from the *general election,* virtually all of their evidence and argument advanced before the District Court focused on the difficulties of gathering petition signatures more than 70 days before the *primary election.*

The State introduced evidence demonstrating that while independent candidates must file their petitions by the same early date on which all candidacies must be perfected, they are favorably treated under various other provisions of State law generally beneficial to

independent candidacies and enjoy certain inherent practical advantages over party primary candidates. This evidence established that:

1. Maryland law places no limit whatsoever on the period during which signatures can be gathered prior to the filing deadline, and an independent candidate may gather petition signatures months and even years before the deadline.

2. Persons signing nominating petitions for independents may be affiliated with the major parties and are not disqualified from voting in the primary elections.

3. Signatures are required of only 3 percent of the registered voters eligible to vote for that office -- a figure substantially less than the maximum heretofore sustained by this Court.

4. Signers do not have to state their intention to vote for the candidate.

5. Although expenditures by and contributions to primary campaigns for State office are subject to State regulation, this is not the case with respect to funds contributed or spent for nomination by petition to State office.

6. Petitions may be circulated by non-residents and persons not registered to vote in Maryland.

7. Because of Maryland's liberal registration by mail statute (Art. 33, § 3-1), independents may simultaneously approach signators and furnish them with a registration by mail form which need only be completed and mailed to complete registration.

In addition, Professor Richard Smolka of American University, as a qualified expert on the law and conduct of elections, testified that an independent candidate seeking signatures would have an easier time gathering signatures before the heat of the primary election campaign, by which time many voters have crystalized their views as to the candidates. He further testified

that unlike a primary candidate, an independent does not have to defeat an opponent to get on the general election ballot, usually spends less, must gather fewer signatures than a primary candidate needs votes, and does not have to urge frequently reluctant voters to the polls but can obtain their "vote" on the spot. He also noted that the petition signer is asked to take the relatively easy step of supporting a candidate without prejudice to his ability to vote to nominate another, whereas the primary candidate must convince his electorate to support him to the exclusion of his opponents. Finally, Professor Smolka noted that because of the large financial investment usually required of primary candidates and the State and federal regulation of campaign spending and contributions, primary candidates have a greater need than independents to know the field of candidates at an early date "in order to make intelligent decisions relative to the solicitation of contributions and the expenditure of monies during the primary election campaign." Professor Smolka's testimony was supported by Willard A. Morris, the State Administrator of Election Laws.

The State also established that during the last gubernatorial election in Maryland (1974) five persons qualified as independent candidates for the Maryland House of Delegates and three for the State Senate via the nomination by petition route, and that in 1976 two persons gathered sufficient signatures by March 8 to qualify for the general election ballot as candidates for the United States House of Representatives.

In addition to the State interests identified through the testimony of its witnesses, Maryland asserted as "compelling" or sufficient numerous other justifications for the simultaneous filing deadline for primary candidates and independents. These included:

1. The prevention of frivolous and fraudulent candidacies.

2. The reduction of voter confusion that intensifies in a Presidential election year.

3. The establishment of a degree of parity between independent and party candidates to inhibit one party from promoting "independent" candidacies to siphon off votes from the other party's nominee or the proliferation of "wait and see" candidates who defer the perfection of their candidacy and their entry into the general election fight until the primary results are in.

4. The fostering of public discussion of campaign issues among *all* candidates when voter interest is at its zenith, rather than allowing independents to maintain a low profile until the primaries have ended.

5. The prevention of the administrative problems that might surface if the petition verification process and likely challenges (such as this one) were telescoped into a shorter and later period of time.

6. The promotion of these interests while still preserving the right of Maryland voters to be heard at an early point in a Presidential election year as to their choice for Presidential nominees.

On May 17, 1976, the court issued its opinion, holding that the filing deadline of Section 7-1(e) (70 days before the primary in a presidential election year) standing by itself constitutes "an unconstitutional burden on Bradley's right to become an independent candidate and on the rights of the other plaintiffs to exercise their right to vote" (App. p. 12a) and that Appellee Bradley had a constitutional right to collect the requisite number of valid signatures until the date of the primary election.[1]

[1] The court strongly suggested that it felt Bradley may be entitled to a filing date even later than the date of the primary election (App. p. 12a). In attempting to tailor its relief in this case to Bradley's particular situation, the court began with the May 18th date of the primary election and gave the candidate an additional 53 days beyond that date on the theory that he had not been "authorized" to collect signatures from the date of his original filing on March 8th until the entry by consent of the court's temporary restraining order on April 30, a period of 53 days. This result obtained notwithstanding Bradley's testimony that he knew on March 8 that he would fall short of the statutorily required number of signatures and notwithstanding the undeniable fact that he was legally free to gather signatures during the 53 day period following March 8th.

The court made no attempt to analyze the evidence presented on the relative burdens of independents and primary candidates, to weigh all of the State interests advanced here, or to focus on the filing deadline in light of other provisions of State law, but concluded that its decision was controlled legally and factually by the opinion of the three-judge district court in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd sub nom. Tucker v. Salera*, 96 S. Ct. 1451 (1976).

> "We do not make detailed findings of fact in the instant case, but the evidence before us leads us likewise to conclude that the March 8 termination date of the signature gathering period in the 1976 general election in Maryland substantially burdened the ability of Bradley to gain access to the ballot and substantially burdened the ability of the other plaintiffs to have Bradley as a candidate of their choice appear on the ballot at the general election for all of the reasons assigned by the *Salera* court." (App. p. 6a).

Even though the statute at issue in *Salera*, unlike the open-ended Maryland law, allowed a scant three week period for the gathering of signatures, even though much of the language in the *Salera* opinion seemed to indicate that the three-judge court in Pennsylvania struck down the Pennsylvania filing deadline in conjunction with the brief signature gathering period,

and even though the practical effect of the *Salera* decision was to obliterate the three week period for the plaintiffs in that case, the court in *Bradley* was convinced that both the Pennsylvania panel and this Court, without giving any weight to Pennsylvania's questionably short signature gathering period, had struck down in isolation the filing deadline for independents of 218 days before the general election. The lower court here rejected the proffered compelling interests asserted by Pennsylvania in *Salera* (administrative convenience, misuse of the nomination by petition procedure by defeated primary candidates and the promotion of intelligent voting through voter knowledge of candidates) as if they were simply being reasserted by Maryland. In addition, the court said that Maryland's simultaneous filing deadline for independents and primary candidates could not be justified on an "equal treatment" theory:

> "Signature gathering by an independent candidate is not the equivalent of the filing of a declaration of candidacy by a partisan candidate; it is the equivalent of the primary election. Maryland's equal treatment argument would have validity only if the deadline for the filing of petitions was the same date as the primary election, but it is not. Moreover, Maryland's professed desire to treat partisan and independent candidates alike does not compel fixing the cutoff date for filing the requisite number of valid signatures 70 days before the primary election. Quite readily, Maryland could require independent candidates to file a declaration of candidacy at the same time as partisan candidates and then extend the date for the submission of signatures to the date of the primary election." (App. p. 9a).

In response to the State's argument that the constitutionality of Section 7-1(e) had been sustained by recent prior decisions of three-judge panels in Maryland,

summarily affirmed by this Court (*Auerbach v. Mandel,* Civil No. 72-141-N (D. Md. March 3, 1972), *aff'd* 409 U.S. 808 (1972) and *Maryland People's Party v. Mandel,* Civil No. 72-865-K (D. Md. September 5, 1972), *aff'd* 410 U.S. 907 (1973)) and was fully supported by summary affirmances of decisions of other jurisdictions (*Socialist Labor Party v. Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan,* 409 U.S. 942 (1972); *Pratt v. Begley,* 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1970); *Jackson v. Ogilvie,* 325 F. Supp. 864 (N.D. Ill.), *aff'd* 403 U.S. 925 (1971)), the District Court said that language in its earlier opinions regarding the Section 7-1(e) filing deadline, while "it seemed to reflect the law at the time it was uttered", was "pure dictum". (App. p. 11a.) The lower court went on to express its belief that while the question had been presented in the *Auerbach* and *Maryland People's Party* Jurisdictional Statements and Motions to Affirm, the Supreme Court had not yet decided the question of the constitutionality of the Maryland filing deadline in summarily affirming those decisions.

Finally, the District Court felt that under *Hicks v. Miranda,* 422 U.S. 332 (1975) it was bound to follow its own perception of the last summary affirmance of this Court, despite less recent summary affirmances and written opinions of this Court to the contrary.[2]

[2] In addition to the cases cited, *supra,* the *Bradley* court denigrated as "no longer the law" on the constitutional treatment of preprimary filing deadlines the written opinions of this Court in *Jenness v. Fortson,* 403 U.S. 431 (1970) and *Williams v. Rhodes,* 393 U.S. 23 (1968). (App. p. 11a.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

DECISIONS OF THIS COURT MANDATE THAT THE BURDEN OF MARYLAND'S UNIFORM PREPRIMARY FILING DEADLINE ON AN INDEPENDENT CANDIDATE'S CONSTITUTIONAL RIGHTS BE GAUGED NOT IN ISOLATION BUT IN CONJUNCTION WITH OTHER ELEMENTS OF THE STATE'S SYSTEM OF GAINING ACCESS TO THE GENERAL ELECTION BALLOT.

Out of respect for the diversity which is the hallmark of State election laws, this Court has always focused on the overall statutory scheme regulating ballot access and has eschewed any rule automatically invalidating individual provisions of State law alleged to burden an independent's rights. In *Storer v. Brown*, 415 U.S. 724, 730 (1974) this Court said:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' What the result of this process will be in any specific case may be very difficult to predict with great assurance." (Citations omitted).

Similarly, this Court has said that when faced with a challenge to restrictions on ballot access, lower courts

must inquire into the "nature, extent and likely impact" of the requirements (*Id.* at 738) and that experience is one valid guide to the extent of the burdens imposed by a statutory scheme. *Id.* at 742; *Jenness v. Fortson, supra,* at 439. See also *Buckley v. Valeo,* U.S. , 46 L. Ed. 2d 659, 735 (1976).

Moreover, this Court has never indicated that all restrictions or burdens placed on the access of nonparty candidates to the ballot affect constitutional rights. Only "excessively" or "severely" burdensome requirements and "substantial" restrictions call constitutional examination into play. See *Storer v. Brown, supra,* 415 U.S. at 729, 738. And even "substantial" restrictions on the right to vote or to associate are not subject to automatic invalidation. It is only when the restrictions severely burden the right to associate for political purposes and the right to vote effectively that discrimination against independent candidates must be justified by the showing of compelling state interests. *Id.* at 729.

These pronouncements and the analytical methodology they require were totally ignored by the lower court in its rush to read *Salera* as signaling a fundamental change in this Court's attitude toward state laws governing minor party or independent candidacies. The lower court's action in striking down Maryland's pre-primary deadline, and in casting a dark cloud over any petition filing deadline for independents and others bypassing the primary elections that occurs before the primaries, not only calls into question the laws of those states which have pre-primary deadlines[3] but also stands as a warning to those states that this alleged

[3] Some of the states include: Arkansas (60 days), Georgia (69 days), Kentucky (55 days), New Jersey (40 days), Ohio (75 days), Oklahoma (35 days), Pennsylvania (49 days), Tennessee (60 days), and West Virginia (31 days).

defect cannot be corrected by otherwise liberalizing the nomination by petition mechanism. It can be remedied *only* by moving back the deadline for filing petitions. Under the lower court's inflexible invalidation of pre-primary deadlines, at least where they occur well in advance of the general election, even a statutory scheme requiring that a mere 50 signatures be gathered to obtain general election ballot access would be determined to be excessively burdensome if the signatures must be filed by a specified date weeks or months before the state's primary.

The fundamental unsoundness of considering the statutory deadline in isolation rather than as a part of the overall scheme is highlighted by the lower court's fashioning of a rule which ignores the actual experience of independent ballot access in Maryland. For example, 8 local candidates qualified as independents under Maryland's nomination by petition procedure in 1974 (which was the same as it is now), and 2 Congressional candidates filed the requisite number of signatures by the March 8 deadline in 1976. Moreover, even Appellee Bradley filed more than the required number of signatures by the deadline at issue in this case; and the evidence before the lower court indicated that his inability to qualify as a candidate was due at least as much to his failure to conduct a sufficiently vigorous and efficient petition campaign as it was to the March deadline.[4]

In short, this Court's requirement that actual experience be examined in determining the burden of a

[4] For example, Bradley paid signature gatherers on a per signature basis rather than for each valid signature and suffered from an invalidation rate of over 20%. He did not use the postcard-registration technique to sign up unregistered voters. He also did not begin gathering signatures as soon as he could have and raised and spent far less than the principal candidates in the Democratic Primary.

ballot access restriction was deliberately abandoned by the lower court. See *Storer v. Brown, supra,* at 742; *Jenness v. Fortson, supra,* at 439.

Furthermore, following hand in hand with the lower court's erroneous examination of Maryland's filing deadline in isolation, is its creation of a rule of reverse discrimination for ballot access cases. Independent candidates must now be afforded advantages not available to party candidates. And states must not attempt, even for the ultimate benefit of the voters and the electoral process, to place party candidates and independents on an equal footing lest they risk a finding of unconstitutional discrimination. In the view of the lower court, equal treatment of all candidates, a value expressly noted when this court sustained ballot access restrictions in *Storer v. Brown, supra,* at 733, and *Jenness v. Fortson, supra,* at 433-34, ceases to be important.

II.

MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE IS CONSTITUTIONAL AS APPLIED TO INDEPENDENT CANDIDATES WHETHER VIEWED IN ISOLATION OR IN THE CONTEXT OF THE OVERALL REGULATORY SCHEME FOR STATE BALLOT ACCESS

At the outset of this abbreviated discussion of the justifications for Maryland's uniform pre-primary filing deadline contained in Section 7-1(e) and of the cases of this Court that support the statute's constitutionality, it is important to emphasize that Maryland does not question the tenet that State ballot access restrictions, including early filing deadlines, can in some cases substantially and unconstitutionally burden the rights of independent candidates and their voting constituency. *Williams v. Rhodes, supra.* Nor does the State challenge the *result* reached in *Tucker v. Salera,*

supra, viz., that a 3-week gathering period for signatures that ends 8 months before the general election is unconstitutional. What the State contends is that the Maryland filing deadline, when properly viewed in the context of the total regulatory scheme, is significantly different and less burdensome than the statute at issue in *Salera,* and is completely justified by interests not at stake and not raised in the Pennsylvania case.

In *Wood v. Putterman,* 316 F. Supp. 646, 649 (D. Md. 1970), *aff'd* 400 U.S. 859 (1970), Circuit Judge Harrison Winter, speaking for two members of a three-judge district court, contrasted the Ohio statute struck down in *Williams v. Rhodes, supra,* with the Maryland nomination by petition law and noted that:

> "7-1 permits nomination by petition signed by only 3% of the total registered voters entitled to vote for the office for which the nomination is sought. *There are no other restrictions of any consequence,* except that no person may join in nominating more than one nominee for each office to be filled; nor may any person sign more than once for the same nominee for an office." (Emphasis added.)

In *Auerbach v. Mandel,* No. 72-141C (D. Md. March 3, 1972), *aff'd* 409 U.S. 808 (1972), Judge Winter speaking for a unanimous three-judge court said that the Section 7-1(e) filing deadline (which occurred 2 days earlier in 1972 than in 1976) although a "heavy burden" was not "an unreasonable time." The court's order in that case expressly declared that the challenged provisions of the State election code including the candidate filing deadline "are not unreasonable or unconstitutionally burdensome and are not invalid."[5]

[5] The language of the district court's order in *Auerbach* belies the suggestion of the lower court here that *Auerbach* did not decide the constitutionality of the Section 7-1(e) filing deadline. Moreover, an examination of the jurisdictional statements in the *Auerbach* case and in *Maryland People's Party v. Mandel,* Civil No. 72-865-K (D. Md. September 5, 1972), *aff'd* 410 U.S. 907 (1973) discloses that this issue was clearly presented to this Court.

A cursory analysis of the entire scheme for nomination by petition in Maryland demonstrates the correctness of these utterances. Unlike the statute at issue in *Salera* which gave a candidate and his supporters only 21 days to gather the requisite number of signatures, Maryland has an "open" signature gathering period. Until the deadline, candidates can spend months or years gathering signatures. Unlike the filing deadline in *Salera,* which was always fixed at approximately seven to eight months before the general election, Maryland's simultaneous filing deadline for independent and party candidates occurs 120 days before the general election in non-Presidential election years[6] and 239 days before the general election in a Presidential election year only because in those years the *entire electoral process* is "stepped up" and off to an early start to give Maryland voters the opportunity to voice their preference in the Presidential primaries and thereby exert some influence at the summer conventions.[7] In addition, Maryland's nomination by petition process imposes no "suffocating restrictions" upon the free circulation of nominating petitions and in this important respect strikingly resembles the Georgia

[6] A deadline ending 150 days before the general election was sustained in *Jenness v. Fortson,* 403 U.S. 431 (1970); and quite conceivably the 120 day provision in non-Presidential election years can be justified on the basis of administrative convenience alone. *Cf. American Party of Texas v. White,* 415 U.S. 767, 787 n. 18 (1974).

[7] Indeed, in 1976 it was the Maryland Democratic Presidential Preference Primary which launched California Governor Edmund G. Brown Jr.'s national campaign for his party's nomination.

statutory scheme scrutinized and upheld in *Jenness v. Fortson,* 403 U.S. 431, 439 (1970):

> ". . . a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand is a person who was not even registered at the time of the previous election."

In no way can it be said that Maryland's statutory scheme operates "to freeze the political status quo." *Id.* at 438.

Appellees' principal complaint below was not that the entire Maryland scheme for independent ballot access froze the political status quo, but that Maryland's filing deadline requires the independent candidate to make excessively early preparations for his candidacy; to, in effect, have finished his horserace, or at least entered the stretch, just as the primary candidates are getting to the starting gate. This is sheer fiction. Few, if any, primary candidates who expect to win are just launching their campaigns on the filing deadline. In most cases a primary candidate has invested a substantial amount of time and labor prior to the filing date, and the evidence below establishes that this was the case with respect to the main contenders in the primary contests for the United States Senate seat sought by Bradley. Bradley was hardly alone among the various candidates when he sought out the voters in late 1975 and early 1976.[8] In the same vein, Appellees' contended

[8] In addition, in *Storer v. Brown, supra,* where this Court upheld a requirement that an independent candidate must not have been affiliated with a political party for a year before the primary, the Court rejected this very same type of burdensome "anticipation" argument:

"It is true that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible 11 months examined in *Rosario* [*v. Rockefeller,* 410 U.S. 752 (1973)] and its direct impact is on the candidate, and not voters." 415 U.S. at 734.

that voters have no interest in a candidacy prior to the March 8th filing date. This is hardly tenable in a Presidential election year when political campaigns are on everyone's mind before the first snowfall in New Hampshire. As just noted, Bradley and his rivals were all approaching and appearing before the voters during this "remote" period, and Bradley did get more than 50,000 signatures on his petitions, and two Maryland independent candidates for the United States House of Representatives were able to generate enough voter interest in early 1976 to satisfy this same 3% requirement which Bradley fell short of. If an independent candidate is unable to generate sufficient interest in his campaign early in the year, he has himself to blame — not the system or the season.

Moreover, the evidence below establishes that the pre-primary filing deadline for independent candidates is found to offer the independent a singular advantage in terms of gathering petitions because he will find it easier to collect signatures at that time. He does not encounter the voter resistance rampant in the heat of a primary or thereafter when voters' views have begun to crystalize regarding party candidates or when many voters have been completely "turned off" by excessive political activity. He is given his chance at a place on the general election ballot before the others have had a chance to capture the loyalty and commitment of the voters.

In many, but admittedly not all, respects the candidate seeking to obtain signatures on a nominating

petition has an easier route to the general election ballot than candidates who must run in primary elections. The evidence offered by the State through Professor Smolka and Willard A. Morris, summarized above at pp. 5-7 establishes these advantages. First, the independent candidate does not have to defeat any particular opponent or opponents in order to gain a place on the general election ballot. Secondly, the number of signatures which he must obtain is almost invariably less than the number of votes which a candidate in a primary election must obtain in order to gain his party's nomination. Third, the independent candidate, at least in Maryland, is given a longer period of time in which to "campaign" for his nominating signatures — since the candidate in a primary election must focus his campaign during a period immediately prior to an election so as to have the greatest impact on the voters and on voter turnout, while the independent candidate need only approach and appeal to a particular voter at a single moment in time (the moment when he asks for the signature) of the candidate's own choosing and, if rebuffed, may later return to that same voter to try again. Fourth, the choice made by a voter in a primary election is an irrevocable one in which he must choose one among several candidates, whereas the choice made by a voter signing a nominating petition is not irrevocable since the voter may withdraw his signature prior to the filing of the petition or may refuse to sign once and then sign when later approached and may, in any event, still vote for another candidate in his party's primary election. The fact that the choice is neither exclusive nor irrevocable in the case of the signing of a nominating petition makes it easier to persuade the voter to exercise that choice in favor of the candidate. And finally, the primary election candidate must get his supporters to

physically go to the polls to vote for him whereas the petition candidate can go to the voters in their homes or elsewhere to get their votes.[9]

We do not mean to suggest that it is easy for an independent to gain a place on the general election ballot or, as the lower court suggested we had urged, that party and independent candidates have identical routes to the ballot. Indeed, neither the route to the general election ballot nor the path to ultimate victory is easy for any candidate. However, a thorough examination of the treatment accorded primary and independent candidates by Maryland law and of the problems inherent in either avenue to the general election ballot will demonstrate that "it is problematical at best which [alternative] is more onerous in fact." *American Party of Texas v. White, supra* at 783 n. 16, and that the Section 7-1(e) filing deadline is not "excessively" burdensome.

Finally, it can hardly be contended that requiring party primary candidates and independent candidates to file their certificates of candidacy at the same time constitutes discrimination such as to call into play substantial or compelling justification for the scheme. In numerous cases courts have pointed to this parity as an additional reason for upholding various state election schemes. For example, in *Jenness v. Fortson,* 403 U.S. 431, 433-34 (1970), this Court specifically acknowledged the parity defense in approving the Georgia election laws, when it stated:

> "The total time allowed for circulating a nominating petition is 180 days, and it must be filed on

[9] In addition, Maryland law does not control or restrict contributions or expenditures relative to the circulation of nominating petitions but does apply to primary election contributions and expenditures. While this distinction does not apply to candidates for federal office (like Bradley), it is true for all State office candidates.

> the second Wednesday in June, the *same deadline that a candidate filing in a primary must meet.*" (emphasis added)

See also *Storer v. Brown, supra,* at 733, where the Supreme Court noted of California's election scheme:

> "The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of independent candidates are very similar to, or identical with, those imposed on party candidates."

A pre-primary filing deadline for all candidates was also present in *Jackson v. Ogilvie,* 325 F. Supp. 864, 867 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), where a challenge to Illinois' election laws was rejected. See also *Pratt v. Begley,* 352 F. Supp. 328 (1970), *aff'd* 409 U.S. 493 (1972) where a three-judge federal court upheld a filing deadline for independents which occurred seven months before the general election:

> "The statute is not unconstitutionally discriminatory. It does not make it any more difficult for an independent candidate to have his name placed on the ballot than a party candidate. The statute simply requires all potential candidates, whether Democrat, Republican or Independent, to file for nomination on the same date." 352 F. Supp. at 330.

See also *Auerbach v. Mandel, supra,* where the lower court in its oral opinion noted that Maryland's uniform filing deadline enabled *all* candidates "to be known at the same time."

Even if the uniform filing deadline for Maryland candidates were found to be excessively burdensome on an independent's rights and discriminatory in favor of party candidates, the statute is justified by a multitude of legitimate State interests. Of those interests proffered by the State in support of its simultaneous filing deadline for all candidates (see pp. 7-8 infra), most

of which were neither advanced in *Salera* nor treated by the lower court here, two stand out as particularly significant. These are the preservation of a necessarily early Presidential preference primary for Maryland voters and the placing of all candidates on an equal footing.

What the lower court failed to realize is that a Presidential election year puts greater burdens on *all* candidates than off-year elections. Although an independent must gather and file his signatures months before the general election, a primary victor must stretch his budget to similarly extend his campaign over a period of at least 8 months before the general election. And voters are faced with a greater prospect of confusion as elections, both national and local, become a year-long preoccupation. But the State quite understandably has determined that a May primary is important in Presidential election years in order to give Maryland voters a role in selecting the Presidential candidates and to increase voter participation in the State electoral process. The lower court's decision demands that the State either forgo this role for its voters *or* favor independent candidates over primary candidates by giving them a filing deadline on or after the date of the primary elections. By allowing later perfection of filings by independent candidates, the way is open to engage in some of the time-honored election tricks which invariably confuse the voters and distort the outcome. For example, one party's nominee might await the outcome of the (other party's) primary and then determine that it would be to his advantage to promote the candidacy by petition of a third candidate for the purpose of artificially siphoning off votes which would otherwise go to the other party's nominee. This might be accomplished either by promoting an independent candidate with a name or political appeal

similar to the opponent. The lower court's "alternative means" — that the State permit an independent to file his certificate of candidacy at the same time as primary candidates but demand the necessary signatures on or after the primary election — would not resolve this problem. Unscrupulous party candidates could still encourage the launching of numerous "protective" petition candidates either to confuse their opponents or to preserve their ability to siphon off the votes when the contingency develops. Nor are such schemes in Maryland electoral politics merely the products of a fertile imagination. Siphoning votes via third candidacies is a hard reality and almost a rule of the game. See *Reeves v. Reeves*, 275 Md. 599 (1975), which involved the siphoning off of votes in a primary by a "name's-the-same" candidate. Furthermore, such a scheme would impose heavy costs in terms of voter confusion and the deferral of full political debate.[10]

The worst fallout from the *Bradley* court's rejection of the proffered State interest in placing all candidates as far as possible on an equal footing[11] is that primary candidates may now have a valid claim of discrimination, a fact this court was distinctly aware of in *Jenness*

[10] As a substantial interest, the State contended below that § 7-1(e) forced an independent candidate to "surface" as far as the electorate was concerned to face the issues the primary candidates were debating with their opponents. Although "public discussion [by candidates] is a political duty", *Buckley v. Valeo, supra*, 46 L. Ed. 2d at 707, Appellee Bradley sought to avoid this obligation during the signature gathering period by instructing volunteers circulating petitions: "Do not discuss issues."

[11] Whatever differences that can conceivably be said to exist in the State's treatment of independent and primary candidates can be laid to the nature of their candidacies and the necessity of separating independent signature gathering campaigns from a primary election campaign to avoid voter confusion.

v. Fortson.[12] The lower court belittled the primary candidate's need to know the identity of the independent candidate at filing time because at that point he did not know the identity of his general election opponent from the opposite party. Such reasoning ignores the fact that a primary candidate always knows that he will have an opponent from the opposite party. However, under the lower court's "alternate means", he would not know he was to have in addition an independent opponent until after the primary election and possibly well into his general election campaign, perhaps after a substantial amount of campaign funds had already been spent or committed in different directions.

The lower court also emphasized that an independent candidate would not know who his opponents were until after the primary. However, *as of the filing date*, an independent does not truly know whether he himself will qualify for the general election ballot. In

[12] At 403 U.S. 440, this Court said:

"The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. Although the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot at the general election. Surely an argument could as well be made on behalf of the 10 who lost, that it is *they* who were denied equal protection vis-à-vis a candidate who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate."

light of the 35-day validation process and the possibility of legal challenges to the petitions, he may not be certain of his own status until after the primary election. In the present case, the court's opinion was filed one day before the May 18 primary.

This tunnel vision of the lower court is further evidenced by its sole focus on the respective burdens of primary *contestants* and *potential* independent candidates and its blindness to the situation of primary *victors* and independents who qualify for the general election ballot. Maryland's 70 day pre-primary filing deadline allows 35 days for signature validation and another 35 days for challenges, with the result that *all* general election candidates are known to each other and the voters at approximately the same time. However, under the lower court's rule, primary victors are forced to run "in a vacuum" for at least 35 days (in the present case from May 18 to July 13 plus 35 days) and a successful independent gets a late start in the general election since he does not know his status until at least 35 days after he submits his signatures (here mid-August).

In short, instead of Maryland's carefully-designed, workable statutory scheme for adjusting the relative burdens of obtaining general election ballot access, the lower court, out of concern for excessive burdens and discrimination, has created in Sisyphean fashion,[13] a system that unjustly discriminates against primary candidates and imposes greater hardships on all candidates.

[13] In ancient mythology, Sisyphus was condemned to roll a heavy stone to the top of a hill only to see it roll back again. T. Bullfinch, *Bullfinch's Mythology* 270 (1947).

III.

ALTHOUGH *HICKS v. MIRANDA* REQUIRES THAT EFFECT BE GIVEN TO A RESULT THIS COURT REACHES THROUGH SUMMARY AFFIRMANCE, IT DID NOT RELIEVE THE DISTRICT COURT OF ITS OBLIGATION TO DISTINGUISH AND HARMONIZE PRIOR SUMMARY AFFIRMANCES AND WRITTEN DECISIONS OF THIS COURT, NOR DID IT SUGGEST THAT SUMMARY AFFIRMANCES REPRESENT AN ADOPTION OF THE PRECISE REASONING OF THE LOWER COURT.

A fundamental issue in this case is whether lower courts should be permitted to read the mind of this Court in preference to its words. On two occasions the court below opined on the effect to be given particular summary affirmances of this Court. The three-judge panel noted that the issue of the constitutionality of the Section 7-1(e) filing deadline had been raised in this Court in *Auerbach* but said "we do not believe that the Supreme Court decided it". (App. p. 11a). Yet, despite the fact that the issue as framed for this Court in *Salera* wove together the constitutionality of both the signature gathering period and filing deadline for independent candidates in Pennsylvania,[14] the lower court here said "we are confident that *Salera* did decide the issue before us", (App. p. 8a.) *viz.*, the validity *vel non* only of a pre-primary filing deadline. Absent in the court's opinion was any attempt to employ the methodology of *Storer* and *Jenness* or any serious attempt to distinguish the substantial amount of authority in support of

[14] According to Pennsylvania's Jurisdictional Statement in *Salera*, the relevant question was framed: "Whether the United States District Court for the Eastern District of Pennsylvania, sitting as a three-judge court pursuant to 28 U.S.C. §2284, committed error in ruling that, under the Pennsylvania Election Code, the requirement that candidates of political bodies collect signatures for their nomination papers between the tenth and seventh Wednesdays prior to the primary election, *and* file such nomination papers no later than the seventh Wednesday prior to the primary election, violated a constitutional right secured by the United States Constitution." (Emphasis added)

the constitutionality of Section 7-1(e). In effect, the lower court declared that the summary affirmance in *Salera* had overruled the following written and summary decisions of this Court: *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972) (upholding a filing deadline of 90 days before the primary and 9 months before the general election); *Pratt v. Begley*, 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1972) (upholding a filing deadline of 55 days before the primary and 7 months before the general election); *Jenness v. Fortson*, 403 U.S. 431 (1970) (upholding a filing deadline of 69 days before the primary and 5 months before the general election even though this provision was coupled with a 180-day signature-gathering period and a 5% signature requirement); and *Williams v. Rhodes*, 393 U.S. 23 (1968) (where the filing deadline later sustained in *Sweetenham* was struck down *but only* in conjunction with restrictive provisions of Ohio law which made it virtually impossible for a nonparty candidate to obtain ballot access).[15] Apparently of little concern to the panel below during this devastation of this Court's ballot access cases was the fact that less than two months before the *Salera* affirmance *Jenness* was relied upon by this Court to sustain the constitutionality of certain provisions of the Federal Election Campaign Act in *Buckley v. Valeo, supra*, at 733-36, or that the *Auerbach* and *Wood* cases were cited favorably in *Storer, supra*, at 739, n. 10 when this Court last gave plenary consideration to a ballot access case.

[15] In addition, the lower court laid waste to *Auerbach, Maryland People's Party* and *Wood v. Putterman*, the three cases between 1970 and 1973 in which this Court gave summary, favorable consideration to the constitutionality of Maryland's nomination by petition process (which has not since changed).

The lower court cited *Hicks v. Miranda*, 422 U.S. 332 (1975), as authority for its out of hand dismissal of the precedential value of the above decisions. However, *Hicks v. Miranda* stands only for the unchallenged propositions that a summary affirmance by the Supreme Court is a decision on the merits in a case and that lower courts are not free to disregard such decisions. It does not elevate the lower court opinion to equal footing with the words of this Court, nor does *Hicks v. Miranda* prescribe the weight to be given the lower court's reasoning in light of a summary affirmance that follows hard on the heels of a line of written and summary decisions which suggest or mandate a result contrary to that reasoning but consistent with the result in the case.[16] In light of the seriousness with which this Court regards the prospect of overruling a prior decision, lower courts should have a similarly weighty obligation to reconcile a single summary affirmance with other Supreme Court decisions of recent vintage by employing the methodology set out in this Court's written decisions.[17] Any other course might

[16] As noted earlier, we have no quarrel whatever with the result of striking down a three-week signature-gathering period which ends as early as was the case in *Salera*.

[17] The lower court here avoided numerous opportunities to distinguish *Salera* from the present case. First and foremost was the requirement of the Pennsylvania statute that signatures be gathered within 21 days. The three-judge court for the District of Maryland, like the lower court in *Salera*, was all too quick to proclaim such a feature as *per se* unburdensome under all circumstances, a course which this Court eschewed in *Storer*, 415 U.S. at 740. In *Storer* this Court deemed a 24-day period to gather signatures for an independent Presidential candidate as "a substantial requirement" and remanded the case for a determination of whether this provision coupled with other restrictive features of California law placed too great a burden on independent candidates. As a practical matter, the absence of such a substantial restriction from Maryland's nomination by

invite lower court judges to decide cases on the basis of their predilections and might deter this Court, out of an abundance of caution, from making as frequent use of the necessary technique of summary disposition of cases. Indeed, a summary affirmance here would simply invite the kind of bad guesswork and refusal to reasonably reconcile recent decisions of this Court which characterized the opinion of the lower court here and its blind adherence to its own perception of the import of *Salera*.

A summary affirmance in this case would encourage lower courts to rummage through often sloppily prepared jurisdictional statements to decipher this Court's thinking rather than to read its written opinions and apply their methodology. Finally, a

petition law renders the scheme challenged by Bradley infinitely less burdensome than the Pennsylvania statute. Moreover, even the lower court's opinion contained repeated references to the unconstitutional remoteness from the general election of the "signature gathering period". 399 F. Supp. at 1266-67. *Salera* is also distinguishable in a number of other important respects. It involved a 218-day period before the general election in a non-Presidential election year. In such cases, Maryland requires only a 120-day period. Moreover, the element of the Presidential preference primary present in this case necessarily strengthens the legitimate state interests so summarily rejected in *Salera*. This case also involves substantial interests not presented or discussed in *Salera*, but considered substantial by this Court in prior cases. In addition, *Salera* is distinguishable on the basis of facts the three-judge court in Pennsylvania thought important, *viz.*, the status of the parties. In *Salera* the statute was challenged by a class who expressed its intention to vote for the candidate. 399 F. Supp. at 1262 N. 4. In the present case the only intent averred by Bradley's supporters is their desire to see his name on the general election ballot. Finally, the *Salera* court even determined that the bad weather petition circulators must face when gathering signatures at an early date was important in gauging burdensomeness. 399 F. Supp. at 1266. Evidence before the Bradley court here indicated that in 1975-76 Maryland had one of its mildest winters in history.

summary affirmance in this case would sanction the District Court's "divide and conquer" methodology and lead lower courts to strike down other specific state election provisions (such as the one in this case) heretofore upheld by this Court in assessing total statutory schemes for ballot access.

CONCLUSION

In summary, Appellants urge that the District Court has abdicated its duty to reconcile *Salera* with other decisions of this Court, to employ the methodology set out in *Storer* and *Jenness*, and to gauge the impact of Maryland's candidate filing date in light of other features of the State's election law and the realities of independent ballot access in Maryland. For these reasons, the State contends that the lower court abused its discretion in enjoining State election officials from refusing to accept additional signatures submitted by Appellees after the statutory deadline.

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal and that the questions presented are substantial.

Respectfully submitted,

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APPENDIX

In the United States District Court
for the District of Maryland

Civil Action

T 76-638

Bruce Bradley, John F. Falconer, John McGrath, Gloria Fazio, Paul Poff,

Plaintiffs,

v.

Honorable Marvin Mandel, Francis B. Burch, Attorney General, Willard A. Morris, Administrator, State Administrative Board of Election Laws, Reginald A. Asplen, Chairman, State Administrative Board of Election Laws, Theodore N. Clark, Vice Chairman, State Administrative Board of Election Laws, Ann Schissler, State Administrative Board of Election Laws, James W. Johnson, Jr., State Administrative Board of Election Laws, Stephen R. Fegan, State Administrative Board of Election Laws,

Defendants.

Jon T. Brown, Esquire, James D. Pembroke, Esquire, and Duncan, Brown, Weinberg & Palmer, Attorneys for Plaintiff; Francis B. Burch, Esquire, Attorney General for the State of Maryland, Robert A. Zarnoch, Esquire, George Nilson, Esquire, Assistant Attorneys General for the State of Maryland, Attorneys for Defendants.

Before Winter, Circuit Judge, Thomsen, Senior District Judge, and Kaufman, District Judge.

Argued May 12, 1976 Decided

WINTER, Circuit Judge:

Maryland permits the selection of candidates at a general election for statewide and federal offices by either of two methods: by primary elections by political parties whose status as political parties has been theretofore established, and by nominating petition. § 4-1.[1] Primary elections are fixed by Maryland law to be held on the second Tuesday after the first Monday in September in any year in which there shall *not* be an election for President and Vice President. In any year in which there *shall* be an election for President and Vice President, the primary election shall be held on the third Tuesday in May. § 5-2. When a candidate who is registered as an independent, or who is a member of or affiliated with a partisan organization which is not a political party or is not a member of a political party whose nominees must be nominated by primary election, seeks nomination by petition, he is required to file a certificate of candidacy together with nominating petitions signed by not less than three percent of the registered voters who are eligible to vote for the office for which he seeks nomination. § 7-1. His nominating petitions must be delivered to the Boards of Elections Supervisors for the counties, or Baltimore City, in which the signers on the paper are alleged to reside "not later than 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election should be held under the primary election law . . . ." § 7-1(e). A person seeking a nomination in a primary election is similarly required to file a certificate of candidacy for nomination "not later than nine p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election shall be held under the primary election law," § 4A-3, but he may withdraw his candidacy up to 45 days before the primary. § 9-1.

[1] The Maryland election laws are codified in Art. 33, 3B Ann. Code of Md. (1976). All section references made herein will be to Art. 33 unless otherwise indicated.

The net effect of these provisions in the 1976 presidential election year is that candidates for nomination, whether by the primary election route or by the petition route, must have filed their certificates of candidacy by March 8, 1976. A candidate seeking nomination by the petition route must have also filed nominating petitions containing the requisite number of signatures by March 8, 1976. A candidate by the primary route had the right to withdraw his certificate of candidacy until April 2, 1976. The primary election will be held on May 18, 1976, and the general election will be held on November 2, 1976. Md. Const. Art. XV § 7.

I.

Plaintiff Bruce Bradley is an independent candidate for the United States Senate from the State of Maryland. The remaining plaintiffs are citizens of and registered voters in the State of Maryland who wish to have the name of Bruce Bradley placed upon the ballot for the Maryland general election to be held November 2, 1976. Defendants are various election officials of the State of Maryland. The facts which give rise to this litigation follow:

On March 8, 1976, Bradley filed nominating petitions with twenty-one county election boards in the State of Maryland, including the City of Baltimore. The petitions were accompanied by 53,239 signatures of purported citizens of the state. Based upon the number of voters eligible to vote in the general election, 51,155 valid signatures were required to effect a nomination by petition.[2]

Subsequent to the filing of the petitions and signatures, the State Administrative Board of Election Laws determined that only 42,049 signatures, valid under the

[2] The "validity" of signatures is governed by other provisions of § 7-1. The various requirements are that they be of persons registered to vote, that only signatures of persons registered in the same jurisdiction appear on the same page, that a signer's residence be appended, that the name of a signer be printed immediately below his signature, etc.

numerous requirements of § 7-1, had been filed by Bradley and that this number was insufficient to qualify him to appear on the ballot for the general election in November 1976.

Bradley ceased soliciting signatures on nominating petitions after March 8, 1976. He filed this complaint on April 30, seeking declaratory and injunctive relief on the two principal grounds that (1) the provision of the Maryland law requiring him to file the requisite number of valid signatures to support his certificate of candidacy by March 8, 1976, was invalid because of its remoteness from the general election to be held November 2, 1976 — his claim being that the provision constitutes a violation of the first and fourteenth amendments because it places an unreasonably heavy burden on Bradley to have his named placed on the ballot, and restricts the rights of the remaining plaintiffs to associate freely for the purpose of expressing constitutionally protected political beliefs and to exercise their right to vote, and also that it denies equal protection of the laws because the unnecessarily burdensome requirements of filing nominating petitions at a date far removed from the date of the general election is not applicable to major party candidates — and (2) that the provisions of the Maryland election laws relating to the form and procedure for obtaining "valid" signatures to the nominating petition on their face and as applied deny all of the plaintiffs their first and fourteenth amendment rights by placing an undue burden on Bradley's right to have his name placed on the ballot and thereby restrict the rights of the remaining plaintiffs to associate freely for the purpose of expressing protected political beliefs and exercising their right to vote.

On April 30, the district judge to whom application was made entered an order, with the consent of all parties, permitting Bradley to solicit additional signatures to support his certificate of candidacy and to file the same with defendants until May 18, 1976, but not requiri ıg defendants to take any action thereon until further order of the court. A three-judge court was duly

convened, evidence taken and argument heard, and the case submitted to the court on its merits, including plaintiffs' motion for a preliminary and permanent injunction and declaratory relief, defendants' motion to dismiss, and defendants' motion for summary judgment. At the hearing, defendants' motion to dissolve the three-judge court was summarily denied since the court thought that a substantial question of the validity of a statewide provision of the Maryland election law had been raised.

II.

We address ourselves solely to plaintiffs' claim that the provision of § 7-1(e) requiring the filing of signatures by March 8, 1976 is invalid, because we think this question is determinative of the case. Salera v. Tucker, 399 F.S. 1258 (E.D. Pa. 1975), aff'd summarily sub nom. Tucker v. Salera, ___ U.S. __ 44 U.S.L.W. 3526 (March 22, 1976), is the controlling authority, and we conclude that it requires that plaintiffs be granted relief.

Salera was a decision by a three-judge court which considered two aspects of Pennsylvania's election law with regard to nominating petitions. The Pennsylvania statute, unlike the Maryland statute, imposed a three-week limitation on gathering signatures for nominating petitions and, much like the Maryland statute, required that the signatures supporting a nominating petition be filed not later than 218 days before the general election in a year in which a President and Vice President would not be elected, and 244 days in a presidential election year.[3]

The validity of the statute was attacked on the grounds that (1) the three-week limitation on gathering signatures was an unconstitutional burden on access to the ballot, and (2) the remoteness of the signature gathering period from the general election unconstitutionally impaired the ability of the candidate to qualify

[3] In Maryland, in 1976, the signatures were required to be gathered and filed 239 days before the generàl election.

as an eligible independent candidate. The three-judge court considered these claims separately. With respect to the first, it held, on the authority of Storer v. Brown, 415 U.S. 724 (1974), that "the three week period is constitutional as applied to plaintiffs." 399 F.S. at 1265. The court held the statute invalid, however, on the basis of plaintiffs' second attack, and its reasoning in this regard warrants closer analysis.

With respect to the claim of remoteness, the court found that the termination of signature gathering 218 days before the general election in a non-presidential election year substantially burdened the ability of independent candidates to gain access to the ballot because it forced them to gather signatures before the issues of the upcoming election had been defined, it forced them to complete the signature gathering process in a political vacuum seven weeks before the major parties choose their candidates, it made the task of generating interest among potential voters more difficult than it would be if the signature gathering period were scheduled at a point closer to the general election, and it required that signature gathering be conducted during a time of the year of prevailing adverse weather conditions — another species of burden. 399 F.S. at 1266. We do not make detailed findings of fact in the instant case, but the evidence before us leads us likewise to conclude that the March 8 termination date of the signature gathering period in the 1976 general election in Maryland substantially burdened the ability of Bradley to gain access to the ballot and substantially burdened the ability of the other plaintiffs to have Bradley as a candidate of their choice appear on the ballot at the general election for all of the reasons assigned by the *Salera* court.

After finding the facts, the *Salera* court considered the argument that three state interests arguably were served by holding the nomination paper circulation period as far in advance of the general election as did Pennsylvania. The first, which was rejected, was to provide sufficient time to resolve challenges to the nomination papers and to prepare the ballots in a

deliberate and orderly fashion. Under the evidence, the *Salera* court found that Pennsylvania needed far less time to accomplish these purposes than that which was established under the Pennsylvania statute. 399 F.S. at 1267. The same is true in Maryland. Under Maryland law as applied in 1976, the validity of a nominating petition was required to be determined by April 12, "five weeks or thirty-five days before the day on which the primary election should be held under the primary election law," § 7-1(e), and the certification of candidates whose names will appear on the ballot of the general election is not required to be made to the local Boards of Election Supervisors until August 28, 1976, "[n]ot less than sixty-five days before a general election at which the voters elect the President of the United States . . .," § 8-4. In the instant case, the validity of Bradley's nominating petition was determined by April 12. Presumably a period equal to the time elapsed between March 8 and April 12 (thirty-five days) would be sufficient even if the ascertainment of validity were not undertaken until a later date. The date for certification of candidates is sufficiently removed that validation of the nominating petition could well begin at a later date.

Next, the *Salera* court considered the state's concern that defeated or disaffected primary candidates not use the independent nomination process to thwart the will of the party majority or to wreak vegeance upon the candidate chosen by the party majority. The court concluded that Pennsylvania had accomplished this purpose in other ways. So has Maryland, because Maryland prohibits any person who has been defeated for the nomination for any office in a primary election from having his name printed on the ballot at the succeeding general election as a candidate for any office, § 8-2, and limits nomination by petition to candidates who are registered as independents, or who are members of or affiliated with a partisan organization which is not a political party or who are not members of a political party whose nominees must be nominated by means of primary elections. § 7-1(a).

A third possible state interest which was considered was the state's interest in the intelligent exercise of the franchise by those voting in the primary, i.e., that a voter in a primary can cast his vote more knowledgeably and effectively if he knows which independent candidates will or will not be on the final ballot. The court rejected this as a validating interest because a primary voter would "not know the identity of a much more significant factor in the general election, i.e., the identity of the other major party candidate." 399 F.S. at 1268. We find this reasoning equally applicable in Maryland.

Finding no validating state interest to justify the remoteness of the cutoff date for garnering supporting signatures for the general election, and the resulting burden on the candidate seeking nomination, the court concluded that the cutoff date was invalid.

The Commonwealth of Pennsylvania, through its appropriate officials, appealed to the Supreme Court, and the decision of the three-judge district court was summarily affirmed. We have been furnished with the Commonwealth's jurisdictional statement and the plaintiffs' motions to affirm. We are advised that the Commonwealth filed no response to the motions to affirm. The plaintiffs took no cross-appeal, and we find it significant that in urging summary affirmance the plaintiffs, on the merits, urged that the district court correctly concluded that the remoteness of the cutoff period from the general election was invalid. Plaintiffs did not argue that the shortness of the period for gathering signatures, either alone or in combination with the remoteness of the cutoff period, supported the result.

Under Hicks v. Miranda, 422 U.S. 332 (1975), we are bound by the summary affirmance in *Salera*, if it can be fairly said that *Salera* decides the issue before us and is not distinguishable on any other ground. From our recitation of what was decided in *Salera* and the proceedings in the Supreme Court, we are confident that *Salera* did decide the issue before us. We reject defendants' argument that the shortness of the signature gathering period under Pennsylvania law contributed to the decision of the district court or the Supreme Court. We think that all that these two courts decided was that the remoteness of the cutoff date of the signature gathering period from the general election constituted an impermissible burden on the Pennsylvania candidates' access to the ballot and the other plaintiffs' right to vote.

We therefore turn to the question of whether *Salera* is distinguishable from the instant case:

Maryland urges that there is present in this case a validating compelling state interest not considered in *Salera*, i.e., the desirability of treating partisan and independent candidates alike by requiring all candidates to file on the same date. This argument does not persuade us. Partisan and independent candidates are not treated alike under Maryland law, nor do we think that Maryland has drawn a close analogy between them. Signature gathering by an independent candidate is not the equivalent of the filing of a declaration of candidacy by a partisan candidate; it is the equivalent of the primary election. Maryland's equal treatment argument would have validity only if the deadline for the filing of petitions was the same date as the primary election, but it is not. Moreover, Maryland's professed desire to treat partisan and independent candidates alike does not compel fixing the cutoff date for filing the requisite number of valid signatures 70 days before the primary election. Quite readily, Maryland could require independent candidates to file a declaration of candidacy at the same time as partisan candidates and then extend the date for the submission of signatures to the date of the primary election. In summary, we think that an "equal treatment" rationale is faulty and the attempt to distinguish *Salera* on this ground fails.

Maryland next argues that *Salera* should not be given the construction that we place upon it because a consequence would be that our decision in Auerbach v. Mandel, Civil No. 72-141-N, and Barnhart v. Mandel,

Civil No. 72-142-N (D. Md. March 3, 1972), aff'd summarily, 409 U.S. 808 (1972), and Maryland People's Party v. Mandel, Civil No. 72-865-K (D. Md. September 5, 1972), aff'd summarily, 410 U.S. 901 (1973), would be overruled, and it cannot lightly be supposed that in affirming summarily in *Salera* the Supreme Court intended to overrule *Auerbach, Barnhart,* and *People's Party sub silentio.* We do not agree that the question presented in the instant case was decided in either *Auerbach, Barnhart,* or *People's Party,* although we recognize that a dictum in *Auerbach* may have indicated a contrary view from that which we take now.

In *Auerbach, Barnhart,* and *People's Party,* we were presented with the question of how a new political party could nominate a candidate. There the claim was made that a new political party could nominate a candidate only by qualifying as a "political party" and that it was an impossibility for a new political party thus to qualify with the result that its candidates were barred from the ballot. *People's Party* was decided upon the authority of *Auerbach; Barnhart* was decided on the ground of laches. In *Auerbach,* we decided that, *on the basis of statutory construction,* § 7-1(a) permitted a candidate for public office, who is a member of a partisan organization which is not a political party, to be nominated by petition. We specified that we decided the case "as a matter of statutory construction," and we added, "it seems to us that there is no constitutional question which the suit of the People's Party raises, and as a consequence, we find no basis for giving relief. . . ." True, in practical recognition that we decided the case on March 3, 1972, and March 6, 1972 was the cutoff date under Maryland law for the filing of a petition of candidacy and the obtention of the signatures necessary to make that petition effective, we added:

> We recognize that this is a heavy burden to be met if somebody is to run. We can only say this, that viewed in the perspective of its reasons, March 6th in itself is not an unreasonable time when you consider the need and the State's legitimate interest in closing the registration books in advance of an election and requiring also that all candidates, whether they be candidates in a primary election for one of the major parties or candidates for a party not having the right to resort to nomination by primary or a candidate of a partisan organization which is not a political party, to be known all at the same time.

With respect to the language just quoted, we reiterate that it was pure dictum.[4] While it seemed to reflect the law at the time it was uttered,[5] we are not now persuaded of its correctness, factually or legally. Factually, further examination of the Maryland statutes and the decision of the district court in *Salera* persuades us that the Maryland filing date requirement does not permit all candidates to know all of their opponents at the same time. A primary candidate of a major political party does not know the nominee of an opposing political party—usually the most significant information to be considered by the candidate in concluding whether to run. Nor does a candidate necessarily know his opponents in the primary election in which he seeks to run at the time that he files his

[4] An examination of the jurisdictional statement, motion to affirm and response thereto, filed in the Supreme Court in *Auerbach* and *Barnhart,* discloses that the plaintiffs did seek to raise in the Supreme Court the question of the invalidity of the remoteness of the filing date for a petition of candidacy from the general election as a ground for reversal. But since that issue had not been fully litigated before us, we do not believe that the Supreme Court decided it.

[5] *See* Socialist Labor Party v. Rhodes, 318 F.S. 1262, 1273 (S.D. Ohio 1970) (three-judge court), aff'd sub nom. Sweetenham v. Gilligan, 409 U.S. 942 (1972) (deadline 9 months before general election upheld); Pratt v. Begley, 352 F.S. 328, 330 (D.Ky. 1970) (three-judge court), aff'd 409 U.S. 943 (1972) (deadline 7 months before general election upheld); Jackson v. Ogilvie, 325 F.S. 864, 867 (N.D. Ill.) (three-judge court) (deadline 60 days before general election upheld), aff'd 403 U.S. 925 (1971); Jenness v. Fortson, 403 U.S. 431, 434-35 (1970) (deadline 150 days before general election upheld); *cf.* Williams v. Rhodes, 393 U.S. 23, 27 (1968) (deadline 270 days before general election, in combination with other restrictive provisions, struck down).

certificate of candidacy. Certificates many times are not filed until the last hour of the filing period with the result that knowledge of the identity of his opponent is lacking, and even if known it may be gained too late to make a considered judgment of whether to run. Even if the identity of his opponent is known in time for reflection upon the question of whether to file, under Maryland law that opponent may withdraw before the actual primary election. Again, to the extent that dissemination of knowledge to all is a valid state interest, it could be accomplished in the case of an independent candidate by having him file a certificate of candidacy without requiring him to complete the obtention of the requisite valid signatures seven weeks before the date of the primary election.

Legally, for the reasons we have stated, we think that *Salera* decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it.

III.

For the reasons set forth above, we conclude that plaintiffs should be given declaratory and injunctive relief. A declaration will be granted that the time limitation of § 7-1(e) that nominating petitions shall be completed and filed 70 days before the date on which the Maryland 1976 presidential primary election shall be held constitutes an unconstitutional burden on Bradley's right to become an independent candidate and on the rights of the other plaintiffs to exercise their franchise to vote.

We formulate injunctive relief as follows: We have indicated that we think that constitutionally Bradley at least should have had the right to collect the requisite number of valid signatures until the date of the primary election.[6] The evidence and Maryland's schedule of certification dates establish, however, that administratively it would be feasible for Maryland to afford Bradley a period well beyond that date to complete the signature gathering process.

[6] From the evidence before us and the time schedule for certification of primaries set forth in the Maryland statute, Bradley may be entitled to more, but that case is not before us and we do not decide it.

Bradley was not authorized to gather supporting signatures for the period March 9 to April 30, 1976, when the court ordered that the enforcement of § 7-1(e) be suspended in part. This period comprised 53 days. We therefore conclude that Bradley should be given 53 days after the date of the May 18 primary election to collect and file with defendants additional signatures to support his petition of candidacy, i.e. to the close of business on Saturday, July 10, 1976, or, if that is treated as a holiday, to the close of the next succeeding business day. Thereafter defendants should determine the validity of the same in accordance with the applicable provisions of Maryland law, and if Bradley has obtained and produced a total of 51,155 valid signatures, including those filed on March 8, 1976, defendants shall treat him as properly nominated by petition and certify him as a candidate to appear on the ballot in the general election in accordance with the other applicable provisions of the Maryland statute.

Counsel are requested to agree on a form of final order and present the same within ten days.

HARRISON L. WINTER,
United States Circuit Judge,

ROSZEL C. THOMSEN,
Senior United States
District Judge,

FRANK A. KAUFMAN,
United States District Judge.

ORDER

In The United States District Court
For The District of Maryland

Civil Action No. T-76-638

Bruce Bradley, et al., *Plaintiffs,*

v.

Marvin Mandel, et al., *Defendants.*

This cause came on to be heard on plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Declaratory Relief. It was stipulated that the evidentiary hearing conducted before this court on the Motion for Preliminary Injunction would constitute the trial on the merits of this cause and that further evidentiary proceedings before this court would not be required. The court having considered the complaint, the motion, the memorandum and affidavits submitted in support thereof, and the opposition thereto; and having taken evidence and heard oral argument thereon by counsel; and it being determined for reasons stated in the court's written opinion filed May 17, 1976, that Plaintiffs are being deprived of their constitutional rights and will suffer immediate and irreparable injury by the operation of Section 7-1(e) of Article 33 of the Annotated Code of Maryland (1976 Replacement Volume) insofar as that provision requires an independent candidate to file nominating petitions containing the requisite number of signatures by March 8, in the 1976 presidential election year; and the court having made its findings of facts and conclusions of law, it is

DECLARED that § 7-1(e) of Article 33 of the Annotated Code of Maryland (1976 Replacement Volume),

insofar as that provision requires an independent candidate to file nominating petitions containing the requisite number of signatures by March 8 in the 1976 presidential election year, denies the constitutional rights of Bruce Bradley to obtain a place on the ballot for the general election to be held in November, 1976, and the other plaintiffs to cast a vote for Bruce Bradley at said general election as the candidate of their choice; and it is

ORDERED, that defendants, their agents, servants, employees, and attorneys and all persons in active concert and participation with them be and they are hereby permanently restrained and enjoined from

1. Refusing to accept additional nominating petitions and signatures affixed thereto submitted on or before 5:00 p.m. July 13, 1976, on behalf of plaintiff Bradley;
2. Refusing to validate or cause to be validated, in accordance with the applicable provisions of Section 7-1(e) of Article 33, the additional nominating petitions and valid signatures affixed thereto submitted on behalf of plaintiff Bradley no later than five weeks or thirty-five days after July 13, 1976, or such earlier date as plaintiff Bradley certifies that he has filed all the additional signatures which he proposes to file;
3. Refusing to determine and declare as required by law promptly following such validation of nominating petitions and signatures affixed thereto whether the name of plaintiff Bradley will be placed on the ballot for the office of United States Senator in the general election to be held in Maryland in November 1976; and from
4. Refusing to place the name of plaintiff Bradley on the ballot for the office of United States Senator in the general election to be held in Maryland in November 1976 if it has been

determined that he has obtained 9,106 valid signatures in addition to those filed by March 8, 1976 and previously validated.

HARRISON L. WINTER,
United States Circuit Judge,

ROSZEL C. THOMSEN,
Senior United States
District Judge,

FRANK A. KAUFMAN,
United States District Judge.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In The United States District Court
For The District of Maryland

Civil Action No. T-76-638

Bruce Bradley, et al., *Plaintiffs,*

v.

Marvin Mandel, et al., *Defendants.*

I. Notice is hereby given that all Defendants in this action hereby appeal to the Supreme Court of the United States from the final Order entered in this action on June 2, 1976, declaring the filing deadline for nominating petitions set forth in Section 7-1(e) of Article 33 of the Annotated Code of Maryland (1976 Replacement Volume) to be an unconstitutional denial of Plaintiff Bradley's right to obtain a place on the general election ballot and the other Plaintiffs' right to

vote for said candidate, and permanently enjoining Defendants from refusing to accept and validate additional signatures and nominating petitions gathered by Plaintiffs before July 13, 1976, a new deadline fashioned by the court for the Plaintiff Bradley.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript:

(1) Plaintiffs' Complaint and Memorandum in Support of Motion for Temporary Restraining Order, Preliminary Injunction and for Declaratory Relief with

(2) The Affidavits in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief. (Plaintiffs' Exhibits 1-7.)

(3) Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment for the Defendants and Motion to Dissolve the Three Judge Court and Memorandum of Law.

(4) Statement of Professor Richard Smolka. (Defendants' Exhibit 1)

(5) Statement of State Elections Administrator Willard Morris and Appendices. (Defendants' Exhibit 2)

(6) Transcript of Hearing held May 12, 1976.

III. The following questions are presented by this appeal:

(1) Whether the United States District Court for the District of Maryland, sitting as a three judge court pursuant to 28 U.S.C. 2284, erred in examining in isolation the deadline under Maryland law for filing nominating petitions in a Presidential election year (seventy days before the primary election) without considering the other elements of Maryland's system of gaining access to a place on the general election ballot, and concluding that the

statutory deadline, standing by itself, constitutes an unconstitutional denial of Appellee Bradley's right to obtain a place on the general election ballot and the other Appellees' right to vote for him?

(2) Whether the District Court erred in concluding that *Hicks v. Miranda*, 422 U.S. 332 (1975), required it to give effect to every particular of the lower Court's decision in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd summarily sub nom. Tucker v. Salera*, ___ U.S. ___, 47 L. Ed. 2d 727 (1976), so as to effectively overrule five recent summary decisions of this Court and to ignore the rationale of at least two written decisions of this Court?

(3) Whether, as a result, the District Court abused its discretion in enjoining Appellants from refusing to accept additional nominating petitions and signatures submitted by Appellees after the statutory filing deadline?

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Assistant Attorney General,
ROBERT A. ZARNOCH,
Assistant Attorney General,
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202
Attorneys for Appellants.

PROOF OF SERVICE

I, George A. Nilson, Assistant Attorney General, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the third day of June, 1976, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Plaintiffs by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of

record as follows: Jon T. Brown, Esquire and James D. Pembroke, Esquire, Duncan, Brown, Weinberg & Palmer, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, and James M. Smith, Esquire, Gebhardt & Smith, Suite 3405, 222 St. Paul Street, Baltimore, Maryland 21202, Attorneys for Plaintiffs.

GEORGE A. NILSON,
Assistant Attorney General.

STATUES INVOLVED

Annotated Code of Maryland — Art. 33

NOMINATION BY PETITION

§ 7-1 General provisions.

(a) *Who may be nominated by petition.* — A candidate for any public office who is registered as an independent or who is a member of or affiliated with a partisan organization which is not a political party as defined in this article or who is not a member of a political party whose nominees must be nominated by means of primary elections, may be nominated by petition, as in this section provided. Nothing in this subsection applies to candidates or nominations for election to county boards of education.

(b) *Certificate of candidacy; filing fees.* — A candidate for public office seeking nomination by petition shall file a certificate of candidacy under the provisions of the subtitle "Certificate of Candidacy" of this article with a sworn statement attached that he has on file with the election board or the several boards of the State petitions signed by not less than three per centum (3%) of the registered voters who are eligible to vote for the office for which such nomination by petition is sought. The number of registered voters shall be determined as of the commencement of the four-month period before the primary election for which the nomination is sought. Candidates nominated by petition must pay the fee prescribed in § 4A-6 of this article in the same manner as candidates for nomination at a primary election, with the filing of the certificate of

candidacy of the candidate. Such fees shall be disposed of in the same manner as provided in § 4A-8 of this article.

(c) *Form of petition; affidavit.* — The signatures shall not be appended to one paper but shall be on separate papers, bearing one or more signatures and being no more than 8½ inches in width or 14 inches in length. Such paper shall not contain the names of persons residing in more than one county or in any county and in the City of Baltimore. Each signer shall append to his signature his residence, and the name of the county or city where he is registered as a voter, and immediately below the signature of any signer there shall be either printed or typed the name of the signer. Every paper shall be accompanied by an affidavit or affidavits made before a notary public, or other officer authorized to take oaths under the laws of this State, by one or more persons known personally to the notary public or other officer, and so certified by him and signed by the affiants, to the effect that the signers are known to such affiant or affiants to be registered voters of the county or city as set forth in the petition, and that the affiant or affiants personally saw the signers, in regard to whom he or they make oaths, sign the paper.

(d) *Restrictions on signers.* — No person shall join in nominating more than one nominee for each office to be filled; nor shall any person sign more than once for the same nominee for an office.

(e) *Verification of signatures; endorsement; delivery of petitions to boards and to State Administrative Board of Election Laws; determination of sufficiency of signers.* — Any paper which is to form a part of a certificate of candidacy shall be submitted to the board for the county or the City of Baltimore in which the signers on the paper are alleged to reside. The board shall give to anyone submitting any such paper or papers a signed receipt stating that the paper or papers are on file with the board. It shall be the duty of the several boards in the jurisdiction in which the signers are alleged to be registered voters to verify the number

of legitimate signatures of persons who are registered voters. On any petition, including an associated or included set of petitions, submitted to the board, any question concerning the invalidity of the signature of any person on the petition affects that signature only and does not affect or impair any other portion of the petition or petitions. Following the verification, a duly authorized employee of the board shall endorse on each paper the number of signatures verified by the employee and shall endorse and sign the paper. For the purpose of the endorsement, each paper shall contain a blank space for the endorsement. The papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election should be held under the primary election law, or, in the case of candidates for an office to be filled pursuant to § 22-1 (b) of this article, the papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is three weeks or twenty-one days before the day on which the special primary election is to be held under the Governor's proclamation setting the date for the special primary election. All papers delivered to a board pursuant to this subsection and required to be filed with the State Administrative Board of Election Laws pursuant to § 4A-2 shall, after verification and endorsement as herein required, be mailed or delivered by the board to the State Administrative Board of Election Laws, on the Monday which is five weeks or thirty-five days before the day on which the primary election should be held under the primary election law or, in the case of candidates for an office to be filled pursuant to § 22-1(b) of this article, on or before the Monday which is two weeks or fourteen days before the day on which the special primary election is to be held under the Governor's proclamation. The State Administrative Board of Election Laws shall determine the sufficiency of the percentage of registered voters signing petitions in those cases in which candidates file certificates of nomination or of candidacy in its office. In all other instances, such determination shall be made by the local boards.

(f) *Effect of insufficient number of signatures.* — If the total required number of signatures is not properly appened to the petition, it shall be declared insufficient and the name of the proposed candidate shall not be placed on the ballot.

CERTIFICATE OF CANDIDACY

§ 4A-1 Requirements for persons seeking nomination; listing and use of names, nicknames, titles, etc.

(a) Each person seeking nomination to any public or party office at a primary election, shall file a certificate of candidacy for nomination in the manner and at the time provided in this subtitle. Such person who is a candidate for any State, local, or party office must be a registered voter of the particular county or district in which he seeks to be nominated. A candidate for any federal, State, local or party office shall be affiliated with the party whose nomination or office he seeks. Before finally placing the name of such a candidate on the ballot at the succeeding primary election, the board shall determine that the candidate meets the registration and affiliation requirements of this section. The requirements of this section shall not apply to the party affiliation of any candidate for judicial office for which candidates are permitted to be listed on the ballot without party designation; but the requirements shall be applicable to the filing of any vacancy in any public or party office.

* * * * * *

§ 4A-3. When filed.

Except for certificates of candidacy filed by write-in candidates and as otherwise provided herein, certificates of candidacy shall be received and filed in the office of the appropriate board not later than nine p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election should be held under the primary election law. Certificates of candidacy for an office to be filled by a special election pursuant to § 22-1(b) of this article, shall be received

and filed in the office of the appropriate board not later than nine p.m. on the Monday which is three weeks or twenty-one days before the day on which the special primary election is to be held under the Governor's proclamation setting the date for the special primary election. If the filing date should occur on a legal holiday, the certificates must be received and filed not later than nine p.m. on the next regular business day which is not a legal holiday.

* * * * * *

§ 5-2. Date.

(a) *In general.* — The primary elections by the political parties for candidates for State offices and State central committee shall be held throughout the State on the second Tuesday after the first Monday in September. The primary elections by the political parties in each year in which a national convention is held for the nomination of candidates for President and Vice-President shall be held throughout this State on the third Tuesday in May. A special primary election to fill a vacancy in the office of Representative in Congress shall be held on such date as the Governor shall specify pursuant to § 22-1(b) of this article.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT FILED JULY 29, 1976
PROBABLE JURISDICTION NOTED OCTOBER 4, 1976

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APPENDIX

IN THE

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Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RELEVANT DOCKET ENTRIES

4/30/76—(1) Complaint.

4/30/76—(2) Motion of Plaintiffs for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief.

4/30/76—(4) Order (Thomsen, J.) with consent of Attorneys for Plaintiffs and Defendants restraining

Defendants from enforcing Section 7-1 of the Maryland Election Code and setting hearing on Preliminary Injunction.

4/30/76—(5) Application of Plaintiffs for Convening of Three Judge Court.

5/10/76—(9) Designation of a Three-Judge Court.

5/10/76—(10) Motion of Defendants to Dismiss or in the Alternative for Summary Judgment and Motion of Defendants to Dissolve the Three-Judge Court.

5/12/76—Hearing on Motion of Defendants to dissolve the Three-Judge Court. Motion denied.

5/12/76—Hearing on Motion of Defendants to Dismiss or in the Alternative for Summary Judgment.

5/12/76—Counsel requested the Court to consider the hearing to be on the merits in the event summary judgment was denied.

5/12/76—Argued and held sub curia.

5/17/76—(11) Opinion of Court.

6/2/76—(12) Order.

6/4/76—(13) Notice of Appeal of Defendants to the Supreme Court of the United States.

WHAT MAY BE FOUND IN THE APPENDIX TO THE JURISDICTIONAL STATEMENT

The following three items may be found in the Appendix to the Jurisdictional Statement which was filed with the Jurisdictional Statement:

1. The Opinion of the District Court;
2. The District Court's Order;
3. The Appellants' Notice of Appeal, filed June 2, 1976.

Note that the pagination in the Appendix to the Jurisdictional Statement is in the form "1a, 2a, 3a, ..." 2A, 3A, ..."

COMPLAINT

In the
United States District Court for the
District of Maryland

Civil Action No. T-76-638

Bruce Bradley; John F. Falconer; John McGrath; Gloria Fazio and Paul Poff,
Plaintiffs,

v.

Honorable Marvin Mandel; Francis B. Burch, Attorney General; Willard A. Morris, Administrator, State Administrative Board of Election Laws; Reginald A. Asplen, Chairman, State Administrative Board of Election Laws; Theodore N. Clark, Vice Chairman, State Administrative Board of Election Laws; Ann Schissler, State Administrative Board of Election Laws; James W. Johnson, Jr., State Administrative Board of Election Laws and Stephen R. Fegan, State Administrative Board of Election Laws,
Defendants.

JURISDICTION AND VENUE

1. This suit arises under the Constitution and Laws of the United States.

2. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

3. This Court has jurisdiction over this action under 28 U.S.C. §1331 (Federal Question) and under 28 U.S.C. §2201, *et seq.* (Declaratory Judgments).

4. Venue is properly laid in this District under 28 U.S.C. §1391(b) since all parties to the action reside within the State of Maryland.

5. Plaintiff Bruce Bradley is a citizen of the United States and a resident of the State of Maryland. He is a registered voter of the State of Maryland and is not a member of an organized political party as defined by the Election Code of the State of Maryland. Md. Ann. Code, Art. 33. He is an independent candidate for the Office of United States Senator from the State of Maryland and desires that his name be placed upon the ballot for election to that office in the general election to be held in November, 1976.

6. Plaintiff John F. Falconer is a citizen of the United States and a resident of the State of Maryland. He is a registered voter in the State of Maryland and has signed a nominating petition which was filed with the State Administrative Board of Election Laws which petition was filed in order to have the name of Bruce Bradley placed upon the ballot for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976. Said nominating petition was filed pursuant to the Election Code of Maryland. Md. Ann. Code, Art. 33, §7-1.

7. Plaintiff John McGrath is a citizen of the United States and a resident of and a registered voter in the State of Maryland. He desires to sign a nominating petition in order to have placed upon the ballot the name of Bruce Bradley as an independent candidate for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976. He has not, to date, signed such a petition.

8. Plaintiff Gloria Fazio is a citizen of the United States and is a resident of and registered voter in the State of Maryland. She signed a nominating petition in order to have placed upon the ballot the name of Bruce Bradley as an independent candidate for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976. Her

signature was determined to be invalid and was not counted for purposes of placing the name of Bruce Bradley on the ballot in the November election for the reason that she did not print or type her name beneath her signature.

9. Plaintiff Paul Poff is a citizen of the United States and a resident of and a registered voter in the State of Maryland. He signed a nominating petition in order to have placed upon the ballot the name of Bruce Bradley as an independent candidate for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976. His signature was determined to be invalid and was not counted for purposes of placing the name of Bruce Bradley on the ballot in the November election for the reason that his signature was appended to a nominating petition sheet which contained the names of persons residing in a county other than the county wherein the instant plaintiff resides.

10. Defendant Marvin Mandel is the Governor of the State of Maryland and, as such, possesses the executive powers of the State of Maryland, has supervisory power over the officers and agents of the Executive Department and has the duty to ensure that the laws of the State of Maryland are faithfully executed. Md. Const., Art. II, §§1,9; Md. Ann. Code, Art. 41, §15.

11. Defendant Francis B. Burch is the Attorney General of the State of Maryland and, as such, is the supervisor and director of the legal affairs of the State of Maryland and is the head of the Department of Law. Md. Const., Art. IV, §3; Md. Ann. Code, Art. 32A, §2, Art. 41, §199.

12. Defendant Willard A. Morris is the State Administrator of Election Laws and as such performs certain duties, statutorily imposed and otherwise, involving the administration and functioning of the election laws and as such performs certain duties, statutorily imposed and otherwise, involving the administration and functioning of the election laws of the State of Maryland. Md. Ann. Code, Art. 33, §1A-1.

13. Defendant State Administrative Board of Election Laws is a statutorily created body whose members are appointed by the Governor of the State of Maryland with the advice and consent of the Senate. *Inter alia*, the Board has the power to exercise supervision over the conduct of elections in the State of Maryland and to determine the sufficiency of the percentage of registered voters signing nominating petitions in order to have the name of Bruce Bradley placed upon the ballot for the office of United States Senator from the State of Maryland for the general election to be held in November, 1976. Md. Ann. Code, Art. 33, §1A-1, 7-1. The Board has the further duty of officially notifying each local county election board of the names of those persons properly nominated for elective office. Md. Ann. Code, Art. 33, §8-4.

14. Each of the remaining defendants, Reginald Asplen, Theodore N. Clarke, Ann Schissler, James W. Johnson, Jr. and Stephen R. Fegan, is a member of the State Administrative Board of Election Laws which Board has the powers and duties to exercise supervision over the conduct of elections in the State of Maryland and, in particular, has the duty to determine the sufficiency of the percentage of registered voters signing nominating petitions in order to have the name of Bruce Bradley placed upon the ballot for the office of United States Senator from the State of Maryland for the general election to be held in November, 1976. Md. Ann. Code, Art. 33, §§1A-1, 7-1.

15. Each of the defendants when acting or refusing to act as herein alleged, were so acting or refusing to act pursuant to the duties of their offices as herein described and prescribed by the Laws and Constitution of the State of Maryland. Notwithstanding the foregoing, the defendants have acted and/or refused to act in a manner contrary to and inconsistent with the First and Fourteenth Amendments to the United States Constitution, and, in so doing, have acted beyond their official capacity, unlawfully and beyond the authority of law. The defendants herein are sued in their official and personal capacities.

STATUTES INVOLVED

16. In order for the name of an independent candidate to appear on the ballot in the State of Maryland, that candidate must comply with the provisions of the Maryland Election Code, Art. 33, §7-1. In relevant part, that section states:

> a. The independent must be nominated by means of a petition process.
>
> b. The independent candidate must file a certificate of candidacy accompanied by a sworn statement that he has on file with the election boards petitions signed by not less than 3% of the registered voters who are eligible to vote for the office for which the nomination by petition is sought. In the case of a candidate for the office of United States Senator, 3% of all registered voters of the State of Maryland must sign nominating petitions.
>
> c. An individual petition sheet may not contain the names of persons residing in more than one county or in any county and in the City of Baltimore. Each signator must append to his signature his residence, the name of the county or City of Baltimore where he is a registered voter and must print or type his name immediately below his signature.
>
> d. Any petition sheet which is to form a part of the certificate of candidacy must be submitted to the election board for the county or city of Baltimore wherein the signers of the petition sheet are alleged to reside. The petition sheets must be delivered to the local election boards by 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election office should be held.
>
> e. The local election boards verify the number of legitimate signatures appended to the petition sheets and the State Administrative Board of Election Laws determines the sufficiency of the percentage of registered voters signing petitions.

f. If the total number of signatures is not properly appended to the petition, the State Administrative Board of Election Laws is required to declare that the candidate has not complied with the Election Code and that the name shall not be placed on the ballot.

17. The date for the primary election is established pursuant to the Election Code of Maryland, Art. 33, §5-2. Pursuant to that section, the date of the primary election for this election year is May 18, 1976.

18. Persons who are members of political parties as defined by the Election Code who desire that their names be placed upon the ballot in the general election to be held in November, 1976 for the office of United States Senator are not required to comply with the above-described nominating petition process; rather, they utilize the primary election process. In order for the name of such a person to be placed on the primary election ballot, he must be a member of a political party as defined by the Election Code and must file a certificate of candidacy for such nomination. Md. Ann. Code, Art. 33, §§401, 4A-1 through 4A-8, 5-1.

STATEMENT OF FACTS

19. Bruce Bradley is currently seeking to have his name placed on the ballot in the November, 1976 general election as an independent candidate for the Office of United States Senator from the State of Maryland.

20. Under the above-described statutory scheme, in order for the name of Bruce Bradley to appear on the ballot in the general election to be held in November, 1976, it was necessary that Bruce Bradley file his certificate of candidacy on March 8, 1976, and that petition sheets to which are appended 51,155 signatures be submitted to local county election boards on March 8, 1976.

21. On March 8, 1976, Bruce Bradley timely and properly filed a properly executed certificate of candidacy. Further, on March 8, 1976, petition sheets to

which were appended 53,239 signatures were submitted to the local election boards.

22. By letter of April 15, 1976, Defendant Morris declared that Bruce Bradley had failed to perform all requirements of nomination by petition, in that a number of signatures appended to the petition sheets were found by the local boards to be invalid for technical and other reasons. The total number of signatures found to be valid did not total in excess of 51,155. Defendant Morris, pursuant to the provisions of the Election Code of Maryland, Art. 33, §7-1, declared that the name of Bruce Bradley shall not appear on the ballot for the general election in November, 1976.

23. Plaintiff Bradley and others made a good faith effort to comply with provisions of the Election Code as above described. Indeed, Plaintiff Bradley did, in fact, literally comply with provisions of the Election Code by filing the required certificate of candidacy and by submitting petitions to local boards upon which were appended a sufficient number of signatures, all of which, to the best knowledge of Plaintiff Bradley, were registered voters of the State of Maryland.

24. Plaintiff Bradley and others experienced great difficulty in garnering signatures from registered voters for the nominating petitions due, in large part, to the temporal remoteness of the petition gathering period which ended on March 8, 1976 from the date of the general election which is November 2, 1976. But for the remote filing date for nominating petitions prescribed by the Election Code of Maryland, Plaintiff Bradley would have submitted to the local boards a number of valid signatures vastly in excess of the number required by the Election Code of Maryland.

FIRST CLAIM

25. The provisions of Article 33, §7-1 of the Election Code of Maryland deny to the Plaintiffs named herein their rights as guaranteed by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment in that the remoteness of the nominating petition filing date from the date of

the general election places an unconstitutionally heavy burden on Plaintiff Bradley to have his name placed on the ballot, thus restricting the rights of the Plaintiffs to associate freely for the purpose of expressing constitutionally protected political beliefs and said provisions unduly limit the number of potential candidates for elective office, thus unconstitutionally impacting the Plaintiffs' right to vote.

SECOND CLAIM

26. The provisions of Article 33, §7-1 of the Election Code of Maryland, as such provisions require the filing of nominating petitions of independent candidates on March 8, deny to one or more of the Plaintiffs named herein their rights as are guaranteed by the Fourteenth Amendment to the United States Constitution in that independent candidates must comply with the unnecessarily burdensome requirements of filing nominating petitions at a date far removed from the date of the general election in order to have their names placed on the ballot in Maryland elections whereas candidates who are members of political parties, as defined by the Maryland Election Code, need not comply with the petition process requirements.

THIRD CLAIM

27. The provisions of Article 33, §7-1 of the Election Code of Maryland deny to the Plaintiffs named herein their rights as guaranteed by the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment in that the undue technical and administrative requirements of the petition signing process place a substantial burden on Plaintiff Bradley to have his name placed on the ballot, thus restricting the rights of the Plaintiffs to associate freely for the purpose of expressing constitutionally protected political beliefs and said provisions unduly limit the number of political candidates for elective office, thus unconstitutionally impacting the Plaintiffs' right to vote.

28. The technical and administrative requirements of the petition signing process which substantially

burden the constitutional rights of the Plaintiffs as herein alleged include but are not limited to:

a. The registered voter must append to his signature on the petition his residence, the name of the county or city where he is a registered voter, and he must type or print his name immediately below his signature.

b. The petition sheets filed at local election boards may not contain the names of persons residing in more than one county or in any one county and in the City of Baltimore.

29. The actions of the Defendants and others which substantially burden the constitutional rights of the Plaintiffs as herein alleged include, but are not limited to:

a. Local election boards, pursuant to their duties prescribed by the Maryland Election Code, Art. 33, §7-1 have declared signatures appended to Bruce Bradley's petition for candidacy not to be "valid" where technical deficiencies unrelated to the signator's status as a registered voter occurred in the petition signing process.

b. The scrutiny applied and efforts expended by the various local election boards in determining the "validity" of signatures appended to petitions filed by Bruce Bradley were not uniform but varied greatly from county to county.

30. The extraneous factors which substantially burdened the constitutional rights of the Plaintiffs as herein alleged include, but are not limited to:

a. During the signature-gathering period, the names of duly registered voters of the State of Maryland were being purged from the lists of registered voters of the State of Maryland pursuant to the Maryland Election Code, Art. 33, §3-26, thus limiting the pool of registered voters who could sign nominating petitions for Bruce Bradley. In numerous cases, the formerly registered voters were not notified of the change in voter registration status.

b. After the completion of the signature-gathering period, *i.e.*, after March 8, 1976, various counties commenced voter registration drives in anticipation of the primary election to be held in Maryland on May 18, 1976. These newly registered voters were not eligible to sign nominating petitions for Bruce Bradley.

c. Despite the good faith effort of Bruce Bradley and his supporters to accept the signatures only of duly registered voters signed in the proper form, only 42,049 signatures were found to be "valid" by county election boards from a total amount of signatures submitted numbering 53,239. This large "invalid" rate rendered the nomination by petition process extremely uncertain and open-ended in that an independent candidate can never be assured that sufficient signatures have been collected to guarantee that the candidate's name will be placed on the ballot.

31. The burdens listed herein at Paragraphs 28-30 exacerbate the basic constitutional deficiency of Article 33, §7-1 of the Maryland Election Code, which is the remoteness of the filing date for independent candidates' nominating petitions from the date of the general election. The above-described burdens (Paragraphs 28-30) constitute a totality of circumstances which also violate the rights of the plaintiffs as guaranteed by the First and Fourteenth Amendments to the United States Constitution as applied to the States by the Fourteenth Amendment.

32. The provisions of Article 33, §7-1 of the Election Code of Maryland, as such provisions place undue technical and administrative requirements on the petition signing process, deny to one or more of the plaintiffs named herein their rights as are guaranteed by the First and Fourteenth Amendments to the United States Constitution in that independent candidates must comply with these unnecessarily burdensome requirements in order to have their names placed on the ballot in Maryland elections, whereas candidates who are members of political parties as defined by the

Maryland Election Code need not comply with the petition process requirements.

FURTHER ALLEGATIONS

33. Additional signatures are currently being gathered for purposes of filing in support of the candidacy of Bruce Bradley. If the relief requested herein by the plaintiffs is granted, the campaign of signature collection will be recommenced, and the requirement of the additional 9,106 signatures needed to fulfill the 3% requirement of the Maryland Election Code, Art. 33, §7-1 will be fulfilled.

34. The defendants, as herein alleged, have acted or refused to act and continue to act or refuse to act in a manner which violates rights of the plaintiffs guaranteed by the United States Constitution.

35. As herein described and alleged, the defendants' acts or refusals to act have caused and continue to cause the plaintiffs immediate and irreparable injury for which the plaintiffs have no adequate remedy at law.

PRAYERS FOR RELIEF

WHEREAS, plaintiffs pray for relief as follows:

1. That this Court enter an Order declaring that Article 33, §7-1 of the Election Code of Maryland is in violation of the First and Fourteenth Amendments to the United States Constitution;

2. That this Court enter an Order requiring the State Administrative Board of Election Laws to place the name of Bruce Bradley on the ballot for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976; or, in the alternative, that this Court enter an Order temporarily and permanently restraining and enjoining the defendants from refusing to place the name of Bruce Bradley on the ballot for the office of United States Senator from the State of Maryland in the general election to be held in November, 1976, unless Plaintiff Bradley is afforded additional time to four weeks after this Court's Order or to July 1, 1976, whichever is later,

in which to collect additional signatures for his nominating petition and unless those additional signatures are validated and counted by the local election boards of each county and the City of Baltimore and by the State Administrative Board of Election Laws as if those signatures had been submitted on March 8, 1976, pursuant to the Maryland Election Code, Art. 33, §7-1; and

3. That this Court enter an Order enjoining the enforcement of Section 7-1 of the Maryland Election Code insofar as it requires the filing of nominating petitions and signatures for Plaintiff Bradley no later than March 8, 1976; and

4. That this Court enter an Order granting plaintiffs their costs of the suit herein and any other such relief as this Court deems meet in the premises.

JAMES M. SMITH,
GEBHARDT & SMITH,
JON T. BROWN,
JAMES D. PEMBROKE,
DUNCAN, BROWN, WEINBERG
& PALMER,
Attorneys for Plaintiffs.

ORDER GRANTING TEMPORARY RESTRAINING ORDER

This matter having come on for hearing on Plaintiffs' Motion for Temporary Restraining Order this 30th day of April, 1976, and upon consideration of Plaintiffs' Complaint, motion, memorandum in support thereof, affidavits and appendices in support thereof, and the oral argument of counsel; and upon a finding by this Court that the Plaintiffs are threatened with immediate and irreparable injury if the requested relief is not granted, and upon a finding that the Complaint raises substantial Federal questions under the First and Fourteenth Amendments to the United States Constitution; and upon a finding that the public interest will be served if the relief requested is granted,

It is HEREBY ORDERED that the Defendants, their agents, officers, servants and employees and all persons in active concert and participation with them are hereby restrained from enforcing Section 7-1 of the Maryland Election Code insofar as it requires Plaintiff Bradley to file his nominating petitions on or before March 8, 1976, from refusing to place the name of Bruce Bradley on the Maryland general election ballot for 1976 as an independent candidate for United States Senator unless and until Plaintiff is afforded additional time (to 9:00 p.m. on May 18, 1976, or until such later date as may be ordered by this Court) in which to collect and file with the appropriate election boards additional signatures for his nominating petitions, provided that the defendants and those acting in concert with them are not required to count and verify such signatures absent further order of this Court.

And it is further ORDERED that the motion for preliminary injunction and further relief shall come on for hearing on the 12th day of May, 1976, at 10:00 a.m.

ROSZELL C. THOMSEN,
United States District Judge.

Dated: 5:45 p.m.
April 30, 1976

AFFIDAVIT OF BRUCE BRADLEY

City of Washington, District of Columbia, SS.:

BRUCE BRADLEY, being first duly sworn, deposes and says:

1. He is a plaintiff in the above-entitled action.

2. This is an action for injunctive and declaratory relief which seeks orders from this Court declaring Maryland Election Code, Art. 33, Section 7-1 to be in violation of the United States Constitution and enjoining the defendants from refusing to place the name of Bruce Bradley on the ballot for the general election to be held in November, 1976, for the office of United States Senator from the State of Maryland.

3. He is a candidate for the office of United States Senator from the State of Maryland. He seeks this office as an independent candidate, thus, he is required to satisfy the requirements of the nomination by petition process as set out in the Maryland Election Code, Art. 33, Section 7-1. *Inter alia,* it was necessary for the campaign to submit to the local election boards petitions to which are appended 51,155 signatures.

4. To obtain 51,155 valid signatures requires an extensive management job including the recruitment of key individuals to co-ordinate the day-to-day operations of a statewide petition drive. The most important of these individuals is the campaign manager, who in turn is responsible for recruiting additional people to fill supervisory and staff positions both at headquarters and in each county where petitions are collected.

5. The actual work of collecting signatures is performed by volunteers during their free time. Thus, a large number of volunteers is necessary and considerable time in which to the signatures is an equally important requisite. To successfully complete the signature collection drive before the March 8 deadline, the basic campaign organization, including the recruitment of campaign manager and his staff members, had to be accomplished a year and one-half before the November, 1976 election. In order to meet expenses, including costs of office space, staff salaries, printed literature, petition forms, and minimum support facilities for petition drives, campaign fund raising had to commence prior to that period, or in excess of one and one-half years before the general election.

6. A petition drive which must be concluded 239 days before the general election imposes severe hardships upon prospective candidates. A voter, in considering whether he wishes to sign the petition of a particular candidate, is interested in three things: (1) the identity and platform of the candidate, (2) his views on important issues of the day, and (3) his position in relation to those of his potential opponents. Because the petition drive had to be conducted so far in advance of the election, it was impossible for any prospective signer to consider Bradley in light of those concerned.

7. In order to campaign effectively as an independent candidate for statewide office in Maryland, adequate press coverage is essential. Since March 8 has been established by the Maryland Election Code as the filing date for nominating petitions, media coverage much in advance of that date was necessary in order to educate the public concerning the petition process and the candidate. This media coverage would both increase the number of persons who would offer to help the campaign and would make individuals more willing to sign nominating petitions by creating an awareness of the upcoming election. In the fall of 1975, which was the most important time in the Bradley campaign, or in any independent's campaign, four major daily newspapers in Maryland, *The Washington Star, The Washington Post, The Baltimore Sun,* and *The Baltimore News American* had not yet assigned political correspondents to cover the U.S. Senate Race in Maryland. There was thus no journalistic machinery to efficiently or properly handle the development of my campaign and petition drive. Because of the lack of press coverage, prospective signers were unaware of who Bradley was, what his platform consisted of, or who his potential opponents were.

8. The early filing deadline further hampers an independent candidate's campaigning role because the issues which will be important in the 1976 election have not yet crystallized when the independent is seeking signatures for his nominating petition. For instance, the issues of 1975 which will not be important in the 1976 election include the Church Committee hearings on CIA activities, the recession and the New York City financial crisis. These issues decrease greatly in importance by the date for the primary and certainly by the date for the general election. Maximum efforts on the part of the independent candidate during the petition drive to make well-known his position on the issues of 1975 may not appreciably affect the voters' impression of the independent candidate concerning his position on the important issues of November, 1976.

9. In recent years, an increased number of voters in Maryland and the U.S. have disassociated themselves from major political parties and have registered as independents. In addition, a decreasing number of voters each year were participating in the political process by voting in the primary or general election. The right of a citizen to petition his fellow citizens in an effort to gain his place on the ballot should not be made more difficult by forcing him to complete what is, in effect, his primary 239 days before the general election and 70 days before the primary elections.

10. As has been more clearly pointed out in other affidavits, the Bradley campaign collected and submitted 53,239 signatures to the election boards in support of the candidacy of Bruce Bradley. The boards determined that numerous signatures submitted were "invalid" for technical and other reasons. Thus, the State Board determined that the name of Bruce Bradley will not appear on the ballot for the general election to be held in November, 1976.

11. As has been more fully pointed out in the affidavit of John Falconer, Willard A. Morris, Administrator of the State Administrative Board of Election Laws has indicated that it would not be unduly inconvenient for the various election boards to count and validate additional signatures collected by the Bradley campaign and submitted to the county boards by July 1, 1976.

12. Unless defendants are enjoined from refusing to place the name of Bruce Bradley on the ballot, he will suffer irreparable harm. If he is forced to remain an uncertified candidate pending resolution of this lawsuit, his publicity, if any exists, will center around this litigation, rather than the platform he represents. He will not be taken as a serious candidate until after a decision by the court, which will be too late for him to maintain an effective campaign. His lack of certification will have a deleterous effect on his ability to raise sufficient funds to conduct his campaign, and will affect both the quality and quantity of media coverage. It will also be difficult to maintain an adequate staff

since volunteers will be unwilling to donate their time to an uncertified candidate.

13. If the relief sought by the plaintiffs is not granted, the electorate will be precluded from voting, if they so choose, for Bruce Bradley in the general election. If the relief requested by the plaintiffs is not granted, affiant will be precluded from running for the office of United States Senate from the State of Maryland. If the relief requested by the plaintiffs is not granted swiftly, the Bradley campaign effort will be irreparably damaged and the affiant will be precluded from joining with others in the advancement of their political beliefs.

14. Unless the defendants are enjoined and restrained from the commission of the acts alleged herein, affiant will suffer great and irreparable damage as above-described.

BRUCE BRADLEY.

AFFIDAVIT OF JOHN FALCONER

City of Washington, District of Columbia, SS.:

JOHN F. FALCONER, being first duly sworn, deposes and says:

1. He is a Plaintiff in the above-entitled action.

2. This is an action for injunctive and declaratory relief which seeks orders from this Court declaring Maryland Election Code, Art. 33, Sec. 7-1 to be in violation of the United States Constitution and enjoining the Defendants from refusing to place the name of Bruce Bradley on the ballot for the general election to be held in November, 1976 for the Office of United States Senator from the State of Maryland.

3. He agreed in 1975 to become the Campaign Manager for Bruce Bradley in his effort to get on the ballot as an independent candidate for the Office of United States Senator from Maryland. As Campaign Manager, he is intimately familiar with the development of the campaign and with the events surrounding

the attempt by Bruce Bradley to gain a place on the ballot by means of the nomination by petition process.

4. In his duties as Campaign Manager, he consulted the relevant Maryland Statute governing the nomination by petition process. He determined that, pursuant to Art. 33, Section 7-1 of the Maryland Election Code, 3% of the registered voters of the State of Maryland must sign nominating petition sheets, that onerous technical requirements surround the petition signing process, and that the signatures must be filed by March 8, 1976.

5. In light of the burdensome requirements placed on independent candidates by the nomination by petition process, he immediately began campaign organization.

6. Of immediate concern was the recruitment of persons to seek signatures for the petitions. This task proved very difficult as a direct result of the early filing deadline and the concomitant requirement that petitioning begin early. Very few persons could feel the immediacy of collecting signatures in the Fall and Winter of 1975 for an election to be held in November, 1976.

7. The burden of collecting signatures at a time months out of synchronization with other political campaigns took a heavy toll on the campaign organization. During the petition gathering period, the campaign recruited and lost three petition chairmen, two schedulers and five county chairmen. The common denominators for the loss of these persons were first, the pressures resulting from coordinating the collection of signatures during the winter, out of doors, in adverse weather conditions and, second, the frustration of expending large amounts of effort during a time period remote from the general election in an unnoticed campaign. The absence of recognition by the media of the candidate and of the signature gathering effort, which was due in part to the remoteness of the campaign activity from the general election, also took its toll on campaign moral. It should be noted here that

the campaign is presently receiving numerous telephone calls from persons who desire to work for the campaign on a voluntary or salaried basis in positions such as field workers, secretaries and press officer.

8. In addition to staff problems, the campaign experienced severe problems in obtaining media coverage. Litterally hundreds of telephone calls were made in an attempt to gain publicity for the campaign. The normal response was that the media would cover the Bradley campaign during the primary election campaigns. The primary election follows the filing deadline for petitions by more than two months.

9. A specific example of the problems of media coverage concerns James Rowland, reporter for the *Washington Star*. When the campaign approached Mr. Rowland to discuss coverage of campaign and petitioning activities, Mr. Rowland indicated that the campaign would be covered along with the party primary elections or when the petitions were submitted by the Bradley campaign to the local election boards, not during the signature gathering period, when media coverage was essential.

10. This lack of media coverage was damaging in several respects. First, campaign morale was severely hurt. Second, the lack of media coverage directly hampered fundraising. Third, and most obviously, the electorate was not made aware of Mr. Bradley's candidacy. This, in turn, hindered the petition gathering efforts since petitioners had to explain to potential signators what the petition process entailed and what Mr. Bradley "stood for".

11. Fundraising is extremely difficult in any campaign. However, that difficulty is multiplied where the funds must be raised to meet current expenses in a time period remote from the general election or the primaries, when the electorate is not politically aware of the upcoming elections, where media coverage is absent and when issues for the election have not been clearly identified.

13. Campaign fundraising figures indicate that receipts of contributions were up 71% in 1976 over those in 1975. Further, the 45-day period following the March 8 deadline for the filing of petitions was the most productive period to date for fundraising purposes. This increase in contributions was due in large part to an increase in political activity in general as the primary election date approaches and was due to the publicity received by Mr. Bradley when his petitions were filed.

14. The physical act of gathering petitions during the winter months is a difficult one. The number of persons present in public places is minimal and where such persons are approached by petitioners, it is a burden for the potential signator to stop and listen to the petitioner. In addition, it should be noted here that only two of fourteen enclosed shopping malls contacted by the campaign would allow signature gathering within the mall. The adverse weather conditions, the winter flu epidemic, the Thanksgiving and Christmas holidays, school examinations, combined with the general factors of the absence of media coverage and low campaign morale caused severe problems in obtaining and maintaining an effective petitioning staff. Indeed, the campaign was forced to resort to hiring persons to collect signatures.

15. In sum, the filing deadline of March 8, 1976 forced the campaign to collect signatures during an extremely difficult period of time — one which was remote from the election, when political interest and awareness was low and during adverse weather conditions.

16. Despite these problems, the campaign was able to collect 53,239 signatures by March 8, 1976, using its utmost efforts. However, it has been learned from the State Administrative Board of Election Laws that numerous signatures submitted were found "invalid" for a variety of reasons. For example, on investigation, it was discovered that hundreds of signatures were found invalid in the Baltimore City/Baltimore County area (including entire petition sheets), because a signator whose residence was in one jurisdiction had

signed a nominating petition for another jurisdiction. This resulted, no doubt, from confusion on the part of the signators over their residence, which was due in part to the physical proximity of these two areas, the urban homogeneity of the areas, and confusion caused by zip code and mailing address similarity in the Baltimore City/Baltimore County area. Indeed, the Baltimore County Board of Elections Office has a Baltimore, Maryland address.

17. Numerous other signatures were declared "invalid" for violations of other technical requirements of Sec. 7-1. Every reasonable precaution was taken to assure that signatures were gathered only from registered voters of the State of Maryland and that every signature was made in the proper form. Each petitioner was given explicit oral and written instructions to aid the petitioner in properly gathering signatures. Indeed, each petitioner was instructed to preface the request for a signature by asking the individual, "Excuse me please. Are you a Maryland registered voter?" Explicit instructions were given to each petitioner describing both the petitioners' duties and the signators' duties. Despite these elaborate precautions, numerous signatures were declared invalid for technical and other reasons.

18. The totality of technical and administrative requirements of the nomination by petition process, complicated by the burdens above-described of operating a campaign and soliciting signatures in a time period remote from the primary or general election date caused extreme hardship in garnering a number of signatures sufficient to comply with Sec. 7-1 of the Election Code.

19. By letter of April 15, 1976, from the State Administrative Board of Election Laws, signed by Willard A. Morris, Bruce Bradley was notified that an insufficient number of "valid" signatures has been submitted to the local election boards and that the name of Bruce Bradley would not appear on the ballot in the general election. *The Washington Star* published an article concerning this refusal to place Bruce

Bradley's name on the ballot. The article, which is appended to this affidavit, further points out the onerous requirements of the Maryland law as compared to other states' requirements.

20. Subsequent to that notification, affiant had several discussions with Willard Morris concerning the effect of the refusal to place Bruce Bradley's name on the ballot, the possibility of reaching an accommodation on this issue, and the necessity for litigation. During these discussions, Willard Morris stated that it would not be unduly burdensome or inconvenient for the county election boards and the State Administrative Board of Election Laws to count and validate additional signatures which the Bradley campaign might solicit and submit if those signatures were received by the local boards on July 1, 1976.

21. Subsequent to receipt of Mr. Morris' letter referred to above, Bruce Bradley's attorney was in contact with the office of the Attorney General for the State of Maryland. The possibilities of reaching an accommodation in the absence of litigation were discussed. On April 26, 1976, it was learned that such an accommodation could not be reached, and the decision was made to institute this suit.

22. If the plaintiffs here do not receive the relief requested in a very brief period of time, the campaign will be irreparably damaged. A non-certified candidate who has pending a lawsuit which may help place him on the ballot is not the type of candidate who receives media attention, donations or volunteer help in running his campaign. Indeed, the campaign has received calls from potential contributors who will donate only after Mr. Bradley is officially on the ballot. An independent candidate faces great difficulties in effectively running a compaign in Maryland due, in part, to the entrenched nature of the two-party system here. If the Plaintiffs here receive the requested relief in August or September, it will be too late to allow the candidate to run his campaign effectively. The campaign, the candidate and the Plaintiffs here will be irreparably damaged.

23. Affiant personally signed a petition in support of the candidacy of Bruce Bradley. To his knowledge, the signature of the affiant was declared valid by the Montgomery County Election Board and was counted by the State Administrative Board of Election Laws for purposes of determining the sufficiency of the number of signatures appended to petitions filed in support of the candidacy of Bruce Bradley.

24. If the relief requested by the Plaintiffs is not granted, affiant will be precluded from voting for Bruce Bradley in the general election. If the relief requested by the Plaintiffs is not granted swiftly, the campaign effort will be irreparably damaged and affiant will be precluded from supporting the candidate of his choice and will be precluded from joining with other in the advancement of their political beliefs.

25. Unless the Defendants are enjoined and restrained from the commission of these acts, affiant will suffer great and irreparable damage as above-described.

JOHN F. FALCONER.

The Washington Star Wednesday, April 21, 1976

A Candidate Against the Odds in Maryland

By Michael Kiernan
Washington Star Staff Writer

If Bruce Bradley were trying to get himself elected to the U.S. Senate from Virginia, instead of from Maryland, he not only would be several thousand dollars richer but he'd be assured of a place on the ballot this November.

As it is, Bradley will have to win a major court decision to get on the ballot in Maryland.

The reason: Bradley is an independent and Maryland happens to have one of the toughest state filing laws for independent candidates.

Bradley has gone to considerable lengths to prove he is a serious candidate, but Maryland election officials

have informed him he's not eligible to run for the Senate seat now held by Republican J. Glenn Beall Jr.

BRADLEY COLLECTED 42,049 signatures of registered Maryland voters — or more than four times what the law requires in Virginia — trying to get on the Maryland ballot. And he had to turn in the signatures to the state's election board on March 8, the earliest filing deadline for independent candidates in all 50 states.

In contrast, Virginia Sen. Harry F. Byrd Jr., who won re-election in 1970 as an Independent, needs to file only 9,007 signatures this June to qualify to run again as an Independent in this year's general election.

And Virginia is not the easiest state in which to run as an Independent. Bradley aides pointed out yesterday that Massachusetts requires only 1,000 signatures and New York, which has four times as many voters as Maryland, requires only 20,000 signatures.

During the last three weeks before the March 8 deadline, Bradley began hiring scores of college students to circulate petitions for him and agreed to pay 17 cents for every signature collected.

Under Maryland law, Bradley needed 51,135 signatures — three percent of the state's 1.7 million registered voters.

HE SUBMITTED some 53,000 names, but election officials threw out 11,000 signatures as invalid.

Bradley's campaign manager, John Falconer, charged yesterday that many signatures were ruled invalid because registered voters signed petitions in counties where they weren't residents.

"This was especially true in the Baltimore area, where Baltimore County residents signed Baltimore City petitions and vice versa."

Falconer, who estimates that Bradley's campaign has spent some $9,000 so far trying to get on the ballot, said Bradley would go to court to challenge the state filing law. He will argue that election officials should have given the candidate more time to collect the 51,000 names.

Willard Morris, state administrator of election laws, said yesterday he was "sympathetic" to Falconer's arguments.

Two years ago the filing deadline for an independent candidate running against Maryland's other senator, Charles McC. Mathias, was July 1, Morris noted.

BUT THE DEADLINE was set almost four months earlier this year, Morris said, because the state presidential primary is being held on May 18. Two years ago, in a non-presidential election year, the state primaries were held in September.

Morris, however, defended the high number of signatures Maryland requires. Other statewide candidates, including George Wallace in 1968 running as a presidential candidate, had been able to comply with the requirement, he noted.

AFFIDAVIT OF SUSAN MADISON

City of Washington, District of Columbia, ss:

SUSAN MADISON, being first duly sworn, deposes and says:

1. Her name is Susan Madison. Her current address is 2638 39th Street, N.W., Washington, D.C. 20007.

2. She is a member of the campaign staff of Bruce Bradley and has worked for the campaign since September, 1975, in an attempt to have the name of Bruce Bradley placed on the ballot in the general election to be held in November, 1976 for the office of United States Senator and to help Mr. Bradley conduct an effective campaign. In addition to other duties, she acts as scheduler for Mr. Bradley.

3. In September and October, 1975, she began making calls to various organizations and individuals to arrange for appearances for Mr. Bradley. She encountered numerous problems in an attempt to schedule those appearances, due in large part to the early date at which the campaign began its efforts which, in turn, was premised on the early filing

deadline for nominating petitions for independent candidates in Maryland.

4. As a general rule, she explained to her target groups the petition process that an independent candidate must go through. These groups were sympathetic to the plight of the campaign, but they were unable to change previously scheduled dates to allow an appearance by an independent candidate. Many of these groups had already scheduled political meetings during the months of March, April and May, 1976 — a time period immediately preceding the party primary elections. The following are examples of her efforts.

5. In January, 1976, she spoke to Mrs. C. J. Plieger, president of the Bethesda-Chevy Chase Women's Club in order to schedule an appearance by Mr. Bradley. Mrs. Plieger informed the affiant that they could not have a political speaker attend their meeting in the absence of other candidates. Mrs. Plieger indicated that she would attempt to schedule a forum in the spring at some time before the May 18 primary when the club members would be more interested in and aware of the local political scene. This club has approximately 800 members.

6. She made numerous attempts to schedule Mr. Bradley for an appearance at the Jewish Community Center in Rockville, Maryland. In January, 1976, she spoke to Mr. P. Kuperburg from the Center and indicated to him that due to the March 8 filing date, an early appearance by Mr. Bradley was imperative. He stated that in fairness to all other candidates, he could not allow one candidate to speak in the absence of others and that Mr. Bradley would have to wait until the Center's "candidates' night" which would be held in April, 1976. The Jewish Community Center has 13,000 members.

7. She contacted Lois O. Stoner, President of the Montgomery County League of Women Voters to schedule an appearance by Mr. Bradley. Ms. Stoner responded she could not even have a short meeting with Mr. Bradley because she felt she had to remain uncommitted until the League's candidates' night was

held in the Spring, shortly before the primary election. Subsequently, Mr. Bradley was invited to attend a League meeting on May 5, 1976. This date is, of course, too late to aid the petition process.

8. On December 5, 1975, she attempted to schedule an appearance by Mr. Bradley before the Wheaton Senior Citizens Group. Barbara Dalman, President of the group, told the affiant that any appearance by Mr. Bradley would have to be delayed until the Spring when the group would try to sponsor a forum for all candidates. Mr. Bradley has been invited to speak before the group on May 1.

9. In September, 1975, she contacted the Silver Spring Chamber of Commerce to schedule an appearance for Mr. Bradley. Beatrice Chaney of that organization told the affiant that before the primary, a group of candidates would be invited to speak, but that they could do nothing concerning politics as early as September, 1975.

10. Of particular importance to the petition drive was contact and exposure to the students at the University of Maryland at College Park. A number of times during 1975, affiant spoke to the Student Government Association President and Vice President to arrange for Mr. Bradley to introduce himself and explain the petition process at one of their meetings. Nothing could be scheduled during December, 1975, January, February, or March, 1976. Since that time, Mr. Bradley has been invited to participate in a candidates' week scheduled for the week of April 19 — nearly seven weeks after the end of the petition process.

11. On December 4, 1975, Dean Yanchik of Loyola College in Baltimore, responding to the affiant's attempt to schedule an appearance, stated that he would welcome Mr. Bradley on campus to speak if the other candidates were invited. However, they were not planning to arrange this until a few weeks before the primary.

12. Since the passing of the March 8 filing deadline, numerous persons and groups have contacted the

Bradley campaign in order to schedule appearances. In addition to the requests noted above, the campaign was contacted by groups including but not limited to the Montgomery County Chamber of Commerce, Hagerstown Community College and Bowie High School. In addition, the campaign received requests after the petition filing deadline for campaign literature and biographical information concerning Mr. Bradley from WRC, NBC and a radio station, WFMD. The interest on the part of the media, citizens groups and educational institutions has increased markedly since the end of the petition gathering period as the date for the primary election nears.

SUSAN MADISON.

AFFIDAVIT OF MARK WINSTON

City of Washington, District of Columbia, ss.:

MARK WINSTON, being first duly sworn, deposes and says:

1. His name is Mark Winston. His current address is 9701 Fields Road, Gaithersburg, Maryland 20760.

2. He is a member of the campaign staff for Bruce Bradley.

3 Subsequent to the submission by Bruce Bradley of the petitions supporting his candidacy, affiant and Kevin Kulesha contacted most local county election boards and the election board for the City of Baltimore to determine, *inter alia*, the methods used by the boards in validating the signatures, the results of the validation, the instructions, if any, received by the local board from the State of Maryland, the date and size of any program to remove voters names from the lists of currently registered voters pursuant to Art. 33, Sec. 3-20 of the Maryland Election Code, and to determine the date and nature of the county voter registration drives.

4. It was determined, on information supplied to the local county election boards that:

a. The Election Board for Baltimore County declared "invalid" a signature which was signed "Mrs. Joseph H. Haut" and to which was subscribed the printed name "Edith D. Haut" since the technical requirements of Sec. 7-1 were not met.

b. The following counties, pursuant to Maryland Election Code, Art. 33, Sec. 3-20, removed the following numbers of registered voters names from the lists of registered voters. The voter "pull" occurred at the dates as below indicated and the voters were notified of this action as below described:

County	*No. Voters Pulled*	*Date of Pull*	*Notification To Voter*
Anne Arundel	4,800	January 1976	-By Mail
Baltimore City	12,000	Jan., Feb. 1976	-Not notified by March 8th
Cecil	1,300	Nov., Dec. 1975	-By Mail
Montgormery	14,000	Nov. '75-Jan. '76	-By Mail
Prince Georges	3,000	January, 1976	-Not Notified
Wicomico	1,200	January, 1976	-Information not available to campaign.

c. Voter registration drives were held in the following as follows:

Baltimore County — high school voter registration drive completed March 31;

Montgomery County — voter registration campaign from April 8 to 19;

Prince Georges County — high school registration drive from March 15-19.

d. The county election boards varied greatly in the amount of effort which would be expended in searching and cross-checking files in order to locate on the voter registration lists the signatures which were appended to nominating petitions. Some jurisdictions such as Baltimore City did not cross-check various files to locate signatures, even if those files were readily available, whereas other counties, such as Cecil County, checked various files to locate a signature.

e. The counties varied greatly in their determinations whether a particular signature was in the proper technical form required by Art. 33, Sec. 7-1 of the Maryland Election Code. Some counties would allow the use of nicknames and initials, while others invalidated signatures for very technical reasons.

5. A more comprehensive, complete and explicit description of the county validation process can be supplied in a supplementary affidavit, if such information is needed. The brevity of this summary is due to time restraints surrounding the institution of the above-entitled suit.

MARK WINSTON.

STATEMENT OF PROFESSOR RICHARD SMOLKA

1. My name is Professor Richard G. Smolka and I am currently a Professor of Government at the School of Government in Public Administration, the American University, Washington, D.C. My academic background, employment history and other related facts are set forth on the attachment to this Statement.

2. I am generally familiar with the statutory and other legal requirements of virtually all of the fifty states relative to the manner in which candidates may have their names placed upon general election ballots by the filing of nominating petitions. In particular, I am familiar with the requirements of Maryland law relative to the nomination of independent candidates by petition, which provisions are set forth primarily in Section 7-1 of Article 33 of the Annotated Code.

3. While the number of signatures required in Maryland (3% of the registered voters eligible to vote for the office in question) is higher than the number required in many states and while independent candidates are required to file their petitions at the same time that all candidates seeking to run in primary elections are required to file their certificates of candidacy, the requirements of the Maryland statute are substantially more liberal than the requirements imposed by many other states in the following respects:

(1) The signers of nominating petitions need not declare in any way their intention to vote for the candidate in question and are in no way precluded by their signing of the petition from voting at a primary election or at the general election in any way they wish.

(2) Persons who sign nominating petitions may be members of a party required to nominate candidates by primary election and may vote at such primary election notwithstanding their having signed a nominating petition.

(3) There is no time limitation whatsoever with respect to the obtaining of nominating petition signatures, and accordingly an independent candidate may begin circulating nominating petitions well in advance of the deadline for their submission.

(4) The person giving the affidavit to the effect that the signers of the petition are registered voters need not himself be a registered voter or a resident of the State of Maryland.

4. A candidate who seeks to obtain signatures on a nominating petition either in the heat of a primary election campaign or following the holding of the primary election will encounter special difficulties which he would not encounter when circulating petitions prior to the time that the primary campaign reaches an active stage. As an election campaign reaches the active stage, voters begin to crystalize their views with respect to the various candidates running for office and, for example, once a voter has decided who he will vote for in his party's primary election for the office of United States Senator, it will be substantially more difficult to persuade that individual to sign a nominating petition for an independent candidate for that same office. Regardless of what the circulators of the petition may say to the voters, the voters will tend to view their signing of such a petition as a commitment of some kind to the independent candidate. They will find this commitment more difficult to make *if they have already decided to vote for a particular person as their party's nominee* for the same office. This resistance on the part of the voter and would-be signer of a

nominating petition increases following the primary election itself when the voter has expressed his choice by actually pulling the lever for the candidate who he wishes to be his party's nominee. This level of voter resistance is not present prior to the active stages of a primary election campaign when voters have not yet made up their minds. Indeed, at this early stage it is frequently not even known which candidates will be seeking the office. For these reasons, the period of time before the active commencement of the primary election campaign is, in many respects, the period during which an independent candidate can most easily obtain signatures on his nominating petition. In essence, he then has first crack at the voters.

5. In many respects the candidate seeking to obtain signatures on a nominating petition has a far easier route to the general election ballot than candidates who must run in primary elections. First, the independent candidate does not have to defeat any particular opponent or opponents in order to gain a place on the general election ballot. Secondly, the number of signatures which he must obtain is almost invariably less than the number of votes which a candidate in a primary election must obtain in order to gain his party's nomination. Third, the independent candidate, at least in Maryland, is given a longer period of time in which to "campaign" for his nominating signatures — since the candidate in a primary election must focus his campaign during a period immediately prior to an election so as to have the greatest impact on the voters, while the independent candidate need only approach and appeal to a particular voter at a single moment in time (the moment when he asks for the signature) of the candidate's own choosing and may later return to that same voter to try again. Fourth, the choice made by a voter in a primary election is an irrevocable one in which he must choose one among several candidates, whereas the choice made by a voter signing a nominating petition is not irrevocable since the voter may withdraw his signature prior to the filing of the petition or may refuse to sign once and then sign when later approached and may, in any event, still vote in his

party's primary election. The fact that the choice is not irrevocable in the case of the signing of a nominating petition makes it easier to persuade the voter to exercise that choice in favor of the candidate. Fifth, the primary election candidate must get his supporters to go to the polls to vote for him whereas the petition candidate can go to the voters in their homes or elsewhere to get their voter. And finally, Maryland law does not control or restrict contributions or expenditures relative to the circulation of nominating petitions but does apply to primary election contributions and expenditures.

6. In many cases, especially where the general election will be more vigorously contested than the primary election, it is extremely important from the point of view of candidates conducting primary election campaigns that they know who their opposition or potential opposition will be in the general election. Because of the dollar limitations imposed on campaign contributions under state and federal law, and given the need of any candidate to spend those funds which he has raised in a prudent manner and at a time when their expenditure is most needed, a primary election candidate must know the magnitude and nature of his opposition or potential opposition in the general election in order to make intelligent decisions relative to the solicitation of contributions and the expenditure of monies during the primary election campaign. If a strong independent nominee will appear on the general election ballot, a candidate in a primary election may understandably exercise more restraint in soliciting contributions and expending funds so that he may save sufficient resources for an anticipated vigorous general election campaign. If, on the other hand, no independent nominee is to appear on the general election ballot and the opposition party is not expected to produce a strong candidate, then a primary election candidate may devote greater resources and greater effort to the primary campaign. Similarly, a candidate in a primary election may alter his approach to issues in that campaign because of the views of or appeal of a known independent candidate.

Conversely, the need of the independent candidate to know who his general election opponent will be at the time he is circulating his nominating petition is not nearly as great. Under Maryland law, contributions given and expenses incurred in the process of gathering nominating petition signatures are not governed by the Fair Election Practices Act since that Act only becomes operative at the time a certificate of candidacy is filed. Since the independent candidate is not running against any particular opponent, he is not as likely to be forced into taking fixed positions on issues which he might alter if he knew for certain who his opponents would be at the general election.

RICHARD G. SMOLKA.

STATEMENT OF WILLARD A. MORRIS

My name is Willard A. Morris. I reside at 909 Heron Drive, Silver Spring, Maryland. I am the State Administrator of Election Laws, having been appointed to that position September 10, 1969 and reappointed on July 1, 1975. The Board's offices are located at 210 Main Street, Shaw House, Annapolis, Maryland. I serve the State Administrative Board of Election Laws which is an independent agency of the Executive Department. The Board has supervision over the conduct of elections and registration throughout the State. The Board receives certificates of candidacy for all State-wide Congressional, Judicial and all other offices that are voted on by the people of more than one county or the City of Baltimore.

From 1949 until 1963, I was the Democratic precinct chairman of the 15th precinct, 13th election district of Montgomery County. In 1954, I was elected to the Democratic State Central Committee and served until 1958. In 1954, I was appointed by Governor McKeldin as a Democratic member of the commission to study the laws governing the Washington Suburban Sanitary Commission and recommend reorganization of the Commission. In 1955, I was appointed as a member of

the Washington Suburban Sanitary Commission and served as a member and Vice Chairman of that Commission until 1963.

In June, 1963 I was appointed Majority Clerk of the Montgomery County Board of Supervisors of Elections by Governor Tawes and served in that capacity until 1967. In 1964, I was instrumental in organizing the Maryland Association of Election Officials and was elected as its first president and served in that capacity until 1968.

In 1965, I was appointed by Governor Tawes to the legislative subcommittee on elections to recodify the election code. The election code, Article 33 of the Annotated Code of Maryland, was enacted in the 1967 legislative session and in June of that year I left the election board and returned to my own business which I had established in 1955 and maintained until 2 years ago, when I sold it to my son.

I am thoroughly familiar with campaign organization and financing, having served in the capacity of campaign treasurer, sub-treasurer, campaign chairman or co-chairman of every campaign, every two years from 1954 to 1966.

During 1967, I continued to work with the Legislative Council's committee on elections in redrafting Section 26 of Article 33 which is now known as the Fair Election Practices Act. This Act was passed by the legislature in 1968.

In 1968, as a result of the nominating petitions filed by Governor George Wallace, for President of the United States, and by George P. Mahoney, for United States Senator, I worked closely with the Secretary of State to redraft the section of the election code titled "Nominations by Petition" which is Section 7-1 of Article 33. That Section as it presently stands was enacted by the General Assembly in 1969. See attachment describing the 1968 petition submissions and the attendent problems. In 1969, the General Assembly also enacted legislation which created the State Administrative Board of Election Laws and transferred to the

Board the duties of the Secretary of State with regard to elections.

I am thoroughly familiar with the requirements of Maryland law relative to nomination of independent candidates by petition, having been involved with this process since the 1968 elections and having reviewed and filed many candidates through the petition route.

Chapters 554 and 436 of the Acts of 1969 and 1970 respectively made numerous changes in the section "Nominations by Petition". Chief among them was the new requirement that a person could sign only a petition that was clearly labeled with the county of which the voter was a resident. It was no longer necessary to include the districts and precincts of the voter because the election board would verify the signatures. The petitioner is required to file his papers with the board for the county or the City of Baltimore in which the signers of the paper are alleged to reside on or before 9:00 P.M. on the Monday which is 10 weeks or 70 days before the day on which the Primary Election is to be held. This is the same date on which party candidates file their certificates of candidacy. The local boards receive the nominating petitions from the candidate or his agents and issue him a receipt which he must file with the State Board together with his certificate of candidacy and his filing fee for the office he seeks. After the deadline for filing the certificates of candidacy or nominating petitions, the local boards have 5 weeks or 35 days in which to certify the signatures and deliver the petitions to the State Board. Chapter 436 repealed Section 7-2 requiring the publication of the petitions.

Although the process of verification may vary slightly from board to board, the intent of the instructions are the same in all jurisdictions.

1. All local boards are instructed that for a signature to be valid, the signer must be a registered voter as of March 8, 1976.
2. A valid endorsement shall consist of a signed name, the printed name and the residence address.

3. The signature may be as a person normally signs his name with his or her proper surname.
4. The printed name shall give the same surname, a full first name and either the first full or initials of a middle name are preferred, however an abbreviated first name is acceptable provided the individual can be identified by his address. A female must use her own given name plus the legal surname.
5. Each name shown must have attached, the residence address of the voter. If the address on the petition does not agree with the address that they have on their master cards they use a signature comparison as guidance in establishing the identify. They must be satisfied that the person is still the same person but may be living at a different address.
6. A change of address on a petition does not invalidate the signature.

The petitioning candidate and his petition circulators bear a certain responsibility to provide data by which signatories can be readily checked. This responsibility is implicit in the specific provisions of the law, Article 33, Section 7-1(c) of the Maryland Code which requires the signatory to print as well as sign his name.

Bradley Petitions

The candidate submitted 53,239 signatures to 21 of the 24 local election boards. Of all the signatures submitted, 94% went to seven counties, namely Anne Arundel, Baltimore City, Baltimore, Harford, Howard, Montgomery and Prince George's. Of these signatures, 20.8% were invalid.

From my personal knowledge, I can safely state that the rate of signature invalidations on nominating petitions and petitions to referendum has historically run from a low of 15% to a high of over 50%.

When Mr. Bradley first visited the Board Office and spoke to me with regard to the number of signatures he

should obtain in order to safely get his name on the ballot, I told him that he should shoot for a minimum of 20% over what would be required and possibly to go to 25%. On later visits from Mr. John Falconer, I repeated the same quote "that he should shoot for 20 to 25% above the required number of valid signatures." Despite the percentage that was suggested as a safe margin, Mr. Bradley submitted only 2,084 signatures over the number of valid signatures needed, or 4.1%.

After reading the complaint in its entirety together with my staff we reviewed hundreds of pages of the petitions in order to answer some of the questions of the complaint.

1. We could not locate any page which was entirely invalidated because of one invalidated signature with the exception of pages on which there was only a single signature. The local boards are well aware of the law that says that you cannot invalidate a whole page of signatures simply because of one invalid signature.
2. We found pages that have been counted with valid signatures on which the notary seal appeared but there was no notary signature or date. The State Board staff is experienced in invalidation of petitions to referendum and the requirements for verification and validation. There were many signatures on this petition that the State Board staff would have invalidated, however, they have been validated by the local boards whose responsibility it was in this case and no additional signatures were invalidated by the State Board office.

Attached to this statement is a list of independent candidates who have qualified for places on the general election ballot over the last 10 years, with particular reference to statewide offices and other offices with large constituencies. It should be noted that local offices, those strictly on a county level, are not included in this summary due to the fact that those candidates file locally and the petitions are retained locally.

I have also attached to this statement the election returns for elections in which these independent candidates have qualified showing their opponents or the prospective opponents in a primary and their opponents in the general elections.

I have reviewed the statement of Professor Richard Smolka and although I am not as familiar with the petition requirements of other States, based on my general knowledge of the procedures and my experience in the electoral process in Maryland generally, I am able to agree with Professor Smolka's statements and the conclusions expressed therein.

WILLARD A. MORRIS.

ATTACHMENT

1968 PETITIONS — STATE WIDE OFFICES

No Presidential Primary in 1968

Petitions filing deadline Saturday, July 27, 1968

45 days before primary election

Registered voters January 1, 1968	1,397,852	
3% valid	41,936	
Petitions filed July 26, 1968 by:		
Wallace for President		
Total signatures	69,712	83.5%
Valid signatures	58,271	
Invalid signatures	11,441	16.5%
Petitions filed July 29, 1968 by:		
Mahoney for U.S. Senate		
Total signatures	75,241	83.1%
Valid signatures	62,542	
Invalid signatures	12,699	16.9%

Wallace paid $16,822.00 for publication of petitions

Mahoney paid $10,160.00 for publication of petitions

In 1968, Section 7-1(e) of Article 33 provided that "If the adequacy of any certificate of candidacy is questioned in writing by any 10 qualified voters, it shall be the duty of the several boards in the jurisdiction in which the signers are registered voters to verify the number of legitimate signatures; . . .". Requests for verification of both petitions were immediately submitted by the required number of voters.

The petitions filed in both cases contained pages with names in several counties, making the certification difficult.

The Secretary of State immediately hired additional help to sort approximately 15,000 pages. Each page was then photocopied as many times as there were various counties on the page. This was a tedious, costly and time consuming process.

After completion of the sorting the photocopies were dispatched to the 24 local boards by State Police on or about August 26, 1968.

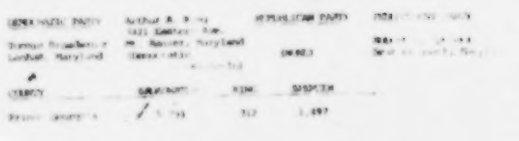
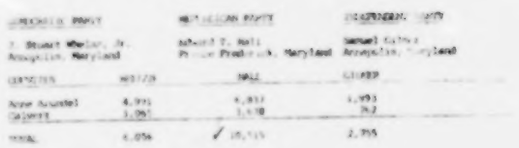
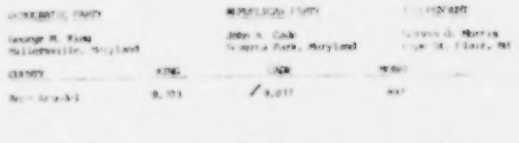
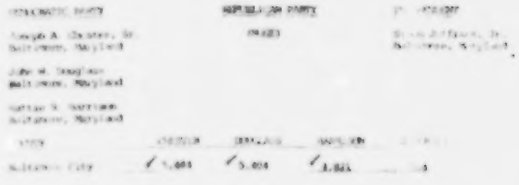
Photocopies do not reproduce various colors of ink, which resulted in confusion by the boards, in many cases as to whether or not validation should be made.

Certification of the ballot is required at least 30 days before the election. With the primary election being conducted September 10, 1968, the boards were extremely hard pressed to make validations in time for the certification of the ballot by the Secretary of State. The General election was held on November 5, 1968. The ballot was certified on October 4, 1968, just 31 days before the election.

BEST COPY AVAILABLE

INDEPENDENT CANDIDATES

1974 ELECTION

NAME OF PETITION CANDIDATES	RACE	DISTRICT	PRIMARY ELECTION CANDIDATES	GENERAL ELECTION CANDIDATES & RESULTS
Robert A. Spencer	State Senate	L. D. 25	Tommie Broadwater, Jr., Dem. Arthur A. King, Dem. Ernest H. Mulligan, Dem. REPUBLICAN PARTY (NO CANDIDATE FILED)	
Samuel A. Gilmer	State Senate	L. D. 30	Casey Hughes, Dem. John Hurley, Dem. J. Stuart Whelan, Jr., Dem. Edward T. Hall, Rep. REPUBLICAN PARTY (NO CONTEST)	
Marvin O. Morris	State Senate	L. D. 33	J. Nelson Clark, Dem. George M. King, Dem. John A. Cade, Rep. REPUBLICAN PARTY (NO CONTEST)	
Simon Jeffries, Jr.	House of Delegates	L. D. 45	Freddie E. Bee, Dem. Leonard E. Cannady, Dem. Joseph A. Chester, Sr., Dem. Johnnie Clinton, Dem. John W. Douglass, Dem. Titus Garnett, Jr., Dem. Hattie N. Harrison, Dem. Patricia Jones McDaniel, Dem. Nathaniel J. McFadden, Dem. Mary B. Ross, Dem. REPUBLICAN PARTY (NO CANDIDATE FILED)	

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INDEPENDENT CANDIDATES

1968 ELECTION

NAME OF PETITION CANDIDATES	RACE	DISTRICT	PRIMARY ELECTION CANDIDATES	GENERAL ELECTION CANDIDATES & RESULTS
George C. Wallace	President of the United States	State-Wide	(No Presidential Preference Primary)	(See attached marked "A")
George P. Mahoney	United States Senate	State-Wide	Charles McC. Mathias, Jr., Rep. Harry Lee Sims, Rep. Paul F. Wattay, Rep. Daniel B. Brewster, Dem. Walter G. Finch, Dem. Richard R. Howes, Dem. Ross Z. Pierpont, Dem.	(See attached marked "C")
		1966 ELECTION		
Hyman A. Pressman	Governor	State-Wide	Moryan L. Amalno, Dem. Andrew J. Easter, Dem. Thomas B. Finan, Dem. Charles J. Luthardt, Sr., Dem. George P. Mahoney, Dem. Clarence W. Miles, Dem. Ross Z. Pierpont, Dem. Carlton R. Sickles, Dem. Spiro T. Agnew, Rep. Andrew John Groszer, Jr., Rep. John Joseph Harbaugh, Rep. Henry J. Laque, Jr., Rep. Louis R. Milio, Rep.	(See attached marked "E")

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MARYLAND

GENERAL ELECTION RETURNS

November 5, 1968

FOR PRESIDENT OF THE UNITED STATES

REPUBLICAN PARTY	DEMOCRATIC PARTY	AMERICAN PARTY
Richard M. Nixon 810 Fifth Ave. New York, N. Y.	Hubert H. Humphrey Waverly Minnesota	George C. Wallace 3600 Farrir St. Montgomery, Ala.
AND	AND	AND
Spiro T. Agnew Government House Annapolis, Md.	Edmund S. Muskie Waterville Maine	S. Marvin Griffin 809 Lamar St. St. Bainbridge, Ga.

COUNTIES AND BALTIMORE CITY	NIXON	HUMPHREY	WALLACE
Allegany	13,561	13,227	5,122
Anne Arundel	36,557	25,381	15,687
Baltimore	108,930	80,798	29,283
Calvert	1,946	2,032	1,471
Caroline	3,120	1,697	1,414
Carroll	11,888	4,658	3,085
Cecil	6,462	4,517	3,25[illegible]
Charles	4,645	4,247	3,17[illegible]
Dorchester	4,183	2,714	3,217
Frederick	13,649	8,316	4,348
Garrett	4,021	1,933	818
Harford	15,799	9,914	4,978
Howard	9,957	5,752	2,796
Kent	2,946	2,243	1,146
Montgomery	84,651	92,026	14,726
Prince George's	73,269	71,524	32,867
Queen Anne's	2,888	1,969	1,298
St. Mary's	3,348	3,280	2,547
Somerset	2,829	2,319	1,899
Talbot	4,902	2,609	1,372
Washington	16,050	11,266	6,737
Wicomico	8,707	5,392	4,356
Worcester	3,541	2,046	1,871
BALTIMORE CITY	80,146	178,450	31,288
GRAND TOTAL	517,995	538,310	178,734

MARYLAND

PRIMARY ELECTION RETURNS

SEPT. 10, 1968

DEMOCRATIC PARTY

	Daniel B. Brewster Glyndon, Md.	Walter C. Finch 114 S. Rollins Rd. Baltimore, Md.	Robert Z. Peterson 5614 Enderly Rd. Baltimore, Md.
	Route 2, Box 111 Edgefield Drive	Rt. 1 Silver Spring, Md.	
	WARD:	BREWSTER	FINCH
	87	2,753	252
	234	7,872	1,144
	326	21,350	4,846
	22	560	163
	5	434	64
	65	1,328	257
	127	1,307	182
	49	1,531	522
	31	972	218
	50	2,857	405
	22	2,405	100
	67	4,071	763
	77	1,463	345
	12	472	79
	381	18,333	1,568
	2,160	29,127	3,256
	18	867	99
	22	1,160	246
	9	388	73
	22	508	100
	149	2,338	620
	30	1,472	191
	41	440	133
	766	47,493	4,186
	4,790	150,681	19,829

	Lee Sims New Hampshire Ave. Silver Spring, Md.	Paul F. Watkins 10120 Edgefield Drive Adelphi, Md.
	WARD:	SIMS
	87	715
	234	609
	326	1,362
	22	37
	5	20
	65	309
	127	178
	49	273
	31	65
	50	456
	22	191
	67	302
	77	225
	12	36
	381	2,[illegible]
	2,160	1,079
	18	22
	22	57
	9	49
	22	42
	149	834
	30	103
	41	15
	766	1,286
	4,790	11,927

REPUBLICAN PARTY

	Charles McC. Mathias, Jr. Box 116, RFD 4 Frederick, Md.	Paul F. Watkins 10120 Edgefield Drive Adelphi, Md.
	WARD:	MATHIAS
	87	4,817
	234	3,167
	326	8,331
	22	[illegible]
	5	[illegible]
	65	1,819
	127	596
	49	608
	31	472
	50	[illegible]
	22	2,128
	67	2,479
	77	2,[illegible]
	12	[illegible]
	381	13,216
	2,160	10,[illegible]
	18	[illegible]
	22	260
	9	293
	22	498
	149	4,087
	30	682
	41	226
	766	8,092
	4,790	66,777

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FOR UNITED STATES SENATOR FROM MARYLAND

REPUBLICAN	DEMOCRATIC	INDEPENDENT
Charles McC. Mathias, Jr. RFD 2, Frederick, Md.	Daniel B. Brewster Glyndon, Md.	George P. Mahoney Owings Mills, Md.

COUNTIES & BALTIMORE CITY	MATHIAS	BREWSTER	MAHONEY
Allegany	15,390	10,953	3,572
Anne Arundel	34,979	24,719	12,188
Baltimore	105,558	69,956	33,691
Calvert	1,844	1,715	1,396
Caroline	2,515	1,759	984
Carroll	10,905	4,594	2,853
Cecil	5,456	4,925	1,742
Charles	3,992	4,161	2,533
Dorchester	3,485	2,992	2,283
Frederick	17,588	5,853	1,934
Garrett	4,085	1,478	764
Harford	15,045	10,042	3,875
Howard	9,521	4,551	2,438
Kent	2,511	2,065	888
Montgomery	105,456	62,484	10,476
Prince George's	76,073	64,635	18,018
Queen Anne's	2,425	1,944	940
St. Mary's	2,592	3,393	2,092
Somerset	2,550	1,996	1,231
Talbot	4,258	3,321	975
Washington	18,714	9,559	3,277
Wicomico	7,598	5,562	2,337
Worcester	3,128	1,885	943
BALTIMORE CITY	86,125	139,890	37,035
GRAND TOTAL	541,893	~~443,667~~ 443,819	148,467

1966 PRIMARY ELECTION RETURNS
SEPTEMBER 13, 1966
GOVERNOR OF MARYLAND

REPUBLICAN PARTY

Spiro T. Agnew
1146 Concordia Dr.
Towson, Md.

Louis R. Miller
2800 E.Ashland Ave.
Baltimore, Md.

Andrew John Grosser,Jr.
1014 Hartmont Rd.
Catonsville, Md.

John Joseph Harbaugh
327 Ferndale Rd.
Glen Burnie, Md.

Henry J. Laque,Jr.
6055 Belle Grove Rd.
Baltimore, Md.

DEMOCRATIC PARTY

Morgan L. Amalmo
16 E. Lake Ave.
Baltimore, Md.

George P. Mahoney
Owings Mills, Md.

Andrew J. Easter
6420 Belair Rd.
Baltimore, Md.

Clarence W. Miles
Queenstown, Md.

Thomas B. Finan
532 Washington St.
Cumberland, Md.

Ross Z. Pierpont
5602 Derby Rd.
Baltimore, Md.

Charles J. Luthardt,Sr.
Glen Burnie, Md.

Carlton R. Sickles
7111 Kempton Road
Lanham, Md.

COUNTIES AND BALTIMORE CITY	AMALMO	EASTER	FINAN	LUTHARDT	MAHONEY	MILES	PIERPONT	SICKLES	AGNEW	GROSZER	HARBAUGH	LAQUE	MILIO
Allegany	40	19	6,247	19	518	36	14	1,502	6,022	826	454	119	164
Anne Arundel	342	88	8,669	1,015	12,786	3,204	342	5,605	4,500	400	321	641	144
Baltimore	983	335	22,654	942	39,812	10,001	925	20,319	15,733	2,099	688	126	185
Calvert	12	11	826	21	1,398	67	3	254	295	36	49	26	17
Caroline	39	22	836	56	929	717	11	457	416	9	18	10	9
Carroll	81	33	1,397	118	1,412	554	143	1,056	3,040	382	109	134	59
Cecil	44	21	1,684	208	2,077	580	169	1,744	1,217	56	123	46	66
Charles	57	10	1,290	21	2,060	60	0	417	1,339	88	131	106	39
Dorchester	43	43	2,075	42	2,523	471	10	668	722	77	70	45	38
Frederick	99	37	3,581	122	1,301	349	68	1,570	3,440	370	198	171	121
Garrett	9	13	725	2	395	12	3	205	1,822	478	229	69	79
Harford	89	108	3,348	117	3,397	1,609	56	2,685	1,762	133	105	61	60
Howard	78	17	2,236	64	1,724	831	0	1,760	2,086	217	60	71	37
Kent	17	6	1,068	26	856	475	10	272	401	14	27	14	16
Montgomery	176	55	17,200	494	6,547	703	101	12,081	21,755	1,640	394	293	218
Prince George's	678	137	19,791	1,193	7,066	739	101	20,375	9,772	531	343	152	146
Queen Anne's	58	31	1,612	75	1,782	282	26	1,204	267	19	27	12	12
St. Mary's	42	25	1,550	27	3,679	51	13	1,170	496	41	34	67	28
Somerset	52	26	1,588	21	981	480	16	262	1,027	30	49	67	44
Talbot	37	47	1,104	46	1,593	960	27	401	649	41	39	22	27
Washington	106	148	3,718	55	2,206	278	26	2,787	4,289	763	222	134	70
Wicomico	62	35	2,797	82	1,633	1,211	35	1,207	1,359	103	52	41	47
Worcester	55	24	1,334	62	1,487	549	21	458	356	24	20	11	15
	3,199	1,290	106,056	4,818	97,262	26,219	1,614	49,458	82,795	8,527	3,762	2,411	-1,041
Baltimore City	2,849	808	28,160	2,517	41,284	15,083	2,697	97,453	12,766	1,460	4,560	954	1,318
Grand Total	6,048	2,098	134,216	7,335	148,446	42,304	4,311	146,507	98,731	9,987	4,322	3,365	2,277

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(T. 64) (Mr. Nilson) Mr. Bradley, when did you first determine to run for the United States Senate in 1976?

(Mr. Bradley) By determine, probably in the spring or summer of 1975, the spring of 1975.

(Mr. Nilson) Can you pin it down to a month?

(Judge Winter) Can you speak up a little, Mr. Bradley. The acoustics in this room leave something to be desired. I have a little trouble hearing you.

(Mr. Bradley) I'm sorry, April or May, 1975 would be accurate.

(Mr. Nilson) Had you thought about it before then, I mean, had you had it under advisement?

(Mr. Bradley) I had engaged before then in talking to others about running, but I had not, personally, decided at that time.

(Mr. Nilson) So, you had been considering it for, I (T. 65) take it, a number of months prior to April or May?

(Mr. Bradley) Certainly.

(Mr. Nilson) As early as January or February of 1975, you had considered it?

(Mr. Bradley) Yes.

* * * * * *

(T. 66) (Mr. Nilson) In the spring of 1975, at the time you were considering and finally deciding to run for the United States Senate, what was your perception as to the likely candidate or candidates in the Republican party primary for that position?

(Mr. Bradley) Could you rephrase that, please?

(Mr. Nilson) Did you expect that Senator Beall would seek the nomination of his party?

(Mr. Bradley) Definitely.

(Mr. Nilson) Did you view Senator Beall as a strong candidate?

(Mr. Bradley) Yes.

(Mr. Nilson) Did you have any expectations as to who might seek the nomination of the Democratic party for the United States Senate position?

(Mr. Bradley) Yes.

(Mr. Nilson) Who did you expect or did you consider as the possible candidate in the Democratic primary?

(T. 67) (Mr. Bradley) Congressman Sarbanes, former Senator Tydings, Governor Mandel and attorneys, Edward Bennet Williams.

(Mr. Nilson) Were there others whose names were being mentioned at that time as possibilities, Barbara Mikulsky, Attorney General Burch?

(Mr. Bradley) Yes.

(Mr. Nilson) Any others?

(Mr. Bradley) Probably there are some, but I can't recall them.

(Mr. Nilson) Did you view the Democratic field as a very strong field, as you looked at it in the spring of 1975, as containing a number of strong candidates?

(Mr. Bradley) Yes.

(Mr. Nilson) In fact, didn't you think that would be what might be called a real Donnybrook?

(Mr. Bradley) Depending on whether or not the Governor decided to run.

(Mr. Nilson) Do you think it has turned out to be a Donnybrook, albeit a two-man Donnybrook?

(Mr. Bradley) Not at all.

(Mr. Nilson) Do you continue to view Congressman Sarbanes and Senator Tydings as strong candidates?

(Mr. Bradley) I do.

(Mr. Nilson) Just a minute, please. There was some testimony offered in one of the other affidavits and some questioning earlier about the difficulties created by the fact that earlier in the year, and going back into (T. 68) 1975, the fact that the issues are a bit different then than they are now, I must confess, I'm still puzzled and I wish you would explain to me, if you

can, why that fact created a problem for you in going out and speaking to voters and stating your position on the issues in an effort to gain their support.

(Mr. Bradley) I believe that the issues and personalities both comprise the same work within which a political campaign takes place and that, whether or not some of these others decided to run was an important consideration in an individual desire to have an alternative. I can only say that many, many times when a particular individual was considered a possible candidate, for instance, the inclination to sign would be greater than when that individual might not be a candidate and, so, I can't separate personalities from issues. They seem to be identified with the issues and collectively, my experience has been that the total process and the total backdrop makes up the framework within which things operate and that, also, when you have a situation similar to the one we had in Maryland, virtually everybody was thinking about that Senate race and those issues and those personalities coming much later. There was a lot of confusion about where I fit in that process.

(Mr. Nilson) Well, to the extent that you were going around to the voters before the, let's say, the primary campaigns had heated up, and speaking to the issues (T. 69) that then were then in the minds of everyone and yourself and the voters, you weren't having your position on those issues being attacked by an opponent or a potential opponent, were you?

(Mr. Bradley) No.

(Mr. Nilson) I mean, you were just expressing your own views on the issues at the time?

(Mr. Bradley) Yes.

(Mr. Nilson) Without having to be particularly concerned that Senator Beall, Senator Tydings or Congressman Sarbanes would lash out on you and say your position on this or that issue was all wet, not correct?

(Mr. Bradley) The likelihood of that occurring was very slim because all through 1975, no one who could

have reported or conveyed my stand on the issues ever covered a speech that I gave.

(Judge Winter) Of course, the converse is true, too, is it not, that you couldn't say to a voter, I think, on so and so, now, compare this to one of my likely opponents, who thinks to the contrary, don't you agree with me and if you agree with me, wouldn't you vote for me or sign my petition? Wasn't that also true?

(Mr. Bradley) Certainly.

(T. 70) (Mr. Nilson) Well, following that up, is it also true, to the extent that your opponents were people who had long prior public life and public record, you could very easily speak to an issue on which Senator Tydings had a voting record, Congressman Sarbanes had a voting record and Senator Beall had a voting record and say, even though, perhaps, they hadn't gotten into the campaign, I am an independent, Bruce Bradley. Look at the way Senator Beall has voted on this issue and look at my position on this issue. You were able to do that back before the primary campaign had heated up, were you not?

(Mr. Bradley) That would have been possible, but that wasn't really the problem that confronted the campaign or the petition process or the realistic political challenge that faced us. Certainly, that's possible.

* * * * * *

(T. 72) (Mr. Nilson) In fact, when you turned in the signatures, didn't you really know that barring some miracle of perfection with respect to the signatures and their validity, that you probably weren't going to make it in terms of valid signatures?

(Mr. Bradley) Yes.

(T. 73) (Mr. Nilson) And, you really knew the night you turned them in?

(Judge Winter) He said yes.

(Mr. Nilson) Okay.

(Mr. Bradley) Let me say—

(Mr. Nilson) It was about the same time — it wasn't a month or so later when you realized that?

(Judge Winter) What was the question, I'm sorry, I missed it.

(Mr. Nilson) I just wanted to establish that the witness knew that on the night or the day or about on the day, March 8th, when he turned that in and my next question is whether or not, during the period following March 8th and preceding the filing of this law suit, there had been efforts continually on your behalf, on the part of volunteers to gather additional signatures, in validation of this law suit.

(Judge Winter) Well, we know there was a consent order which would permit the continued solicitation of signatures. You are asking him whether this has been done?

(Mr. Nilson) No, Your Honor, I'm speaking of the period of time from March 8th, when the witness has just testified—

(Judge Winter) All right, can you answer that question? Was your organization or your friends and (T. 74) your representatives, were they soliciting signatures on petitions up to the time this law suit was filed?

(Mr. Bradley) No, although we have been instructed by Mr. Morris to do so or encouraged by Mr. Morris to do so.

* * * * * *

(T. 78) (Mr. Nilson) Following March 8th and the filing of your 53,000 signatures, in dealing with groups before which you wished to appear, did you ever or generally make it a point to tell them that you just filed all these signatures and you were now a candidate in the full sense of the word?

(Mr. Bradley) Yes.

(Mr. Nilson) That was sort of a put-up prize following March 8th and the filing of those signatures?

(Mr. Bradley) No, I took — no, in the month of March, with the exception of one invitation that had previously been agreed to, my campaign was inactive.

(Mr. Nilson) In April — let's take us into early April.

(Mr. Bradley) I have had one this month.

(Mr. Nilson) But, in approaching groups since March 8th—

(Mr. Bradley) I haven't.

(Mr. Nilson) You haven't approached any of them since March 8th.

(Mr. Bradley) No.

(Mr. Nilson) They have all been coming to you?

(T. 79) (Mr. Bradley) Yes.

(Mr. Nilson) Are they generally aware of the fact you filed your signatures on March 8th?

(Mr. Bradley) If I could clarify this.

(Mr. Brown) Your Honor, I don't know how he can answer that question.

(Judge Winter) If you know.

(Mr. Nilson) If he knows.

(Judge Winter) He already answered it, in part. He said a number of these things, they would write to him and address him as "Dear primary candidate."

(Mr. Bradley) Here's what happened. I think when I went down to Annapolis to file the signatures, to fill out a certificate of candidacy and pay my filing fee, my name then went on a list with the other primary candidates and only then did I begin to get invitations to speak, which I don't think had anything to do with how many signatures I got. I think it had to do with then becoming a part of the traditional political machinery that was in the works, but, then, of course, we knew that our margin was close. We knew the likelihood was that we would have difficulty. I determined not to make any more commitments or spend any more money, hire any other people, something like that, until we understood what would happen.

(T. 80) (Mr. Nilson) You knew long prior to March 8th you were a candidate, a formal candidate in the eyes of federal law, did you not, in other words, you filed reports with the Federal Election Commission and you were—

(Mr. Bradley) Yes.

(Mr. Nilson) You had a live candidacy under the federal law, during the petition gathering process?

(Mr. Bradley) Yes.

(Mr. Nilson) So, to the extent that the source of lists of candidates is from the Federal Election Commission. You were on that list well prior to March 8th, were you not?

(Mr. Bradley) That's right.

* * * * * *

(T. 88) (Mr. Brown) Doctor, you have been tendered to the Court as an expert witness in the area of election laws. Would you briefly describe what your background and experience has been with respect to election laws, per se?

(Professor Smolka) For the last five years, I have been devoting almost all my time to this particular area. Prior to that, I had devoted a considerable portion of my academic, both in teaching and research to the general field of elections and partially to election law, but this would include such things as serving as the professional staff member of the Maryland Constitutional Convention on Elections. It would include founding the Institute of Election Administration at the American University in 1971. I was its only director for (T. 89) four years since it was in existence. I have had an election newsletter on the general subject of election administration for the past five years. This newsletter goes to the Secretary of State, Attorney Generals and the local registrar of voters, Supervisors of Elections throughout the country. In addition, I have performed contract research for the Office of Federal Elections when it was in the General Accounting Office and am currently engaged to do so for the Federal Election Commission.

(Mr. Brown) What type of research are you doing for the Federal Election Commission, such as it is, now?

(Professor Smolka) All right, it is a general structural, functional description of the administration of elections

in the 50 states, the District of Columbia and Puerto Rico, which would include types of state agencies, range of power discretion, and so forth.

(Mr. Brown) With respect to election laws, per se, would it be fair to describe your work as being primarily in the area of partisan elections between major parties?

(Professor Smolka) Not really because we deal with such things as political primaries, general elections, which would include registration of voters which is not exactly in every state, partisan. It also includes the administration of local elections, many of which are non-partisan and, while, obviously, the more important elections are normally conducted on a two party basis, (T. 90) it would include substantial dealings with elections that are either contested by independent candidates and/or are not partisan.

(Mr. Brown) What is the extent of your own personal experience with respect to the petitioning process for independent candidates?

(Professor Smolka) Have I ever collected any?

(Mr. Brown) No, with respect to your academic experience, just with respect to that.

(Professor Smolka) Most recently, I have had two students who collected petitions for Bruce Bradley, one of whom was a field supervisor.

(Mr. Brown) With respect to your academic experience and background, specifically.

(Professor Smolka) Not on collecting. For example, I'm familiar with the problem of seeing how many are gathered, what form they are gathered, who gathers them.

The process, for example, and this is almost on a commercial basis in California compared with an ad hoc basis, perhaps in a state like Missouri. I haven't done any collecting, but I have seen how many can be collected in how great a time and I have talked to many people who have done collections of petitions and they have described both the problems and the difficulties of trying to get them.

(Mr. Brown) You say you are familiar with the process?

(T. 91) (Professor Smolka) Yes.

(Mr. Brown) Speaking once again, only from an academic standpoint, have you done research or conducted studies within your area of concern dealing, specifically, with the problem?

(Professor Smolka) I have not done any quantitative research. I have talked to many state officials who have discussed, for example, the difference between who is eligible to sign a petition, whether the person has to be a registered voter or not a registered voter, whether or not the person has to be or cannot be a member of a political party, whether the person did or did not vote in the primary election, whether the intent of the voter was or was not to support the candidate on whom the petition was signed, the timeliness of the petition, the date on which they may be collected, the number, say, how many you have to get on one petition. Is it easier to get them on a short petition or a long petition, what is the wording? Does the wording commit the voter or not commit the voter, these kinds of things. I'm familiar with all those. Also, the process of verification of the petitions.

(Mr. Brown) Have you done any specific work in the area of determining the relative ease of garnering signatures at various points of time in a campaign?

(Professor Smolka) The only way we can make this (T. 92) determination is to see—

(Judge Winter) Professor Smolka, excuse me, I think the answer is either yes or no. You were asked, have you done any work in this area?

(Professor Smolka) I'm trying to describe the work, Your Honor. I haven't collected any petitions.

(Mr. Brown) That's not the question.

(Judge Winter) That's not the question. Would you restate it, please, Mr. Brown.

(Mr. Brown) Yes, thank you. Have you done any work and that includes work of academic or practical experience in determining the relative ease of petition gathering at various stages prior to a primary or general election?

(Professor Smolka) I have not done any quantitative research specifically directed to that precise point.

(Mr. Brown) Have you ever been a candidate for public office?

(Professor Smolka) No.

(Mr. Brown) You have never collected petitions for a candidate for public office?

(Professor Smolka) No.

(Mr. Brown) Have you ever done a case study on a Independent petition campaign?

(Professor Smolka) No.

(Mr. Brown) Have you done any case studies or engaged in any research which would enable you to (T. 93) conclude that the identity of an independent candidate could be known prior to a primary election?

(Professor Smolka) I don't quite precisely understand how one could do any research to see whether something should be done. I don't understand the question.

(Mr. Brown) Well, let me refer you specifically to your testimony. You mentioned in your testimony that there appears to be an interest on the part of the state or somebody that the identity of an independent candidate be known prior to the primary. Is that a fair characterization of your testimony?

(Professor Smolka) Yes, because we are talking about a competitive situation.

(Mr. Brown) Before you finish that, if I may, have you done any research, either on practical experience or academic research, to enable you to conclude that? Has your research encompassed that area of expertise and study?

(Professor Smolka) Here, I would say it is more practical experience.

(Judge Winter) What practical experience have you had?

(Professor Smolka) I managed a Congressional campaign, Your Honor.

(Mr. Brown) A Congressional campaign, a campaign (T. 94) for a political party?

(Professor Smolka) That's right.

(Mr. Brown) Not an independent?

(Professor Smolka) That's correct.

(Mr. Brown) Was there an independent in the race?

(Professor Smolka) I don't believe so that year.

(Judge Winter) Did you win or lose?

(Professor Smolka) We won the primary, Your Honor.

(Mr. Brown) Your Honor, on the basis of the evidence and testimony which has been presented here, I would move to strike the testimony of Professor Smolka based on the fact the expertise has not been established and, indeed, is contradicted by the evidence which he has given and he is not qualified as an expert witness in the area of the petitioning process.

(Judge Winter) The motion is denied, Mr. Brown, I think in the case of the ruling, first of all, what purports to be testimony is pretty close to arguments and these are facts of the matter, so, even if some of the factual things and conclusions which we could reach for ourselves, if we simply sat down and studied the elections laws for every state, I think on the answer to the specific inquiries which you made, you have brought out, perhaps, goes to the weight of the opinions expressed, but I don't think we are prepared to say, as a matter of law, that the opinions expressed by this (T. 95) witness are inadmissible.

* * * * * *

(T. 116) (Mr. Nilson) Mr. Morris, have there been independent candidates in this 1976 who will appear on the ballot in the general election by virtue of having filed nominating petitions?

(Mr. Morris) Yes.

(Mr. Nilson) Tell the Court who those are.

(Mr. Morris) It will be a Mr. Robin Ficker, candidate for Congress from the 8th District and Montgomery,

(T. 117) Mr. William Salisbury who was a candidate for Congress in the 7th Congressional District in Baltimore City.

(Mr. Nilson) And, are congressional candidates, as in the case of state-wide candidates subject to the 3 percent requirements?

(Mr. Morris) Yes, they are.

(Mr. Nilson) Are they also required to file their nominating petitions by March 8th?

(Mr. Morris) They are.

* * * * * *

(T. 131) (Mr. Brown) It was your testimony, I believe, that there are other candidates in the state who have qualified to run for office as an independent candidate, is that correct?

(Mr. Morris) In this next election?

(Mr. Brown) Yes.

(Mr. Morris) Yes.

(Mr. Brown) Those are not state-wide candidates?

(Mr. Morris) Congressional.

(Mr. Brown) And, when you testified that the 3 percent figure was applicable, you did not mean the 3 percent figure of the entire registered voters in the State of Maryland, did you?

(Mr. Morris) No, with the Congressional District.

(Mr. Brown) For example, how many signatures does that entail for Mr. Ficker?

(Mr. Morris) Mr. Ficker had to have 8,361 ballot signatures.

(Mr. Brown) And, for Mr. Salisbury?

(Mr. Morris) Mr. Salisbury — 3,864.

(Mr. Brown) Mr. Morris, was there another state-wide candidate for the independent state-wide or national office who was attempting to qualify as an independent?

(Mr. Morris) There were some petitions filed for another state-wide candidate, yes.

(Mr. Brown) Who was that?

(T. 132) (Mr. Morris) Eugene McCarthy.

(Mr. Brown) And, did former Senator McCarthy qualify by the March 8th deadline?

(Mr. Morris) No.

(Mr. Brown) How many signatures were filed on behalf of Senator McCarthy?

(Mr. Morris) 12,424, that's signatures, not ballots.

(Mr. Brown) How many valid signatures?

(Mr. Morris) 9,147.

(Mr. Brown) Mr. Morris, the attachment to your prepared testimony deal with the elections of 1968 and 1974, is that correct?

(Mr. Morris) Yes.

(Mr. Brown) And, is it the case that in 1968 and 1974, that the filing deadline for independent candidates was in July in both years?

(Mr. Morris) In 1968, there was no presidential primary.

(Mr. Brown) So, the filing deadline for independents was in July?

(Mr. Morris) It was in July.

(Mr. Brown) And, in 1974?

(Mr. Morris) In 1974 it was in July.

(Mr. Brown) And, each of the candidates who are shown to have qualified in those years, thereby, were not required to file their nominating petitions until July, is that correct?

(T. 133) (Mr. Morris) There were different dates in July, between the two of them, too, because of the difference in the primary dates.

(Mr. Brown) They were not required to file until the month of July, is that correct?

(Mr. Morris) That's correct.

* * * * * *

(T. 137) (Judge Winter) All right, you may ask him if he knows of any reason why changing the date for filing a petition in a presidential year of a year of a presidential election to July would present a situation, Mr. Morris, which would create an impractical situation, administratively.

(Mr. Morris) Your Honor, could I answer that in a little different manner? The fact that it was put to July 1st and I refer to the newspaper story and my conversation with Mr. Bradley, and the fact that he is saying here that I said until July the 1st. I said until July the 1st for one-third of the petitions provided in a presidential year the candidates submitted two-thirds of the petitions by the filing deadline because there's four months difference in that year than in a gubernatorial year. That was clearly stated and they're all aware of that.

(Mr. Nilson) Your Honor, I would be prepared to stipulate that the answer to your question on impossible administrative burden by changing the date in a presidential year, and conform roughly to that in a gubernatorial year, from the point of view of administration and the function of the election official, it would create an impossible or insurmountable problem, and in (T. 138) that respect it is no different from the administrative machine point of view than a gubernatorial election.

* * * * * *

(T. 139) (Mr. Brown) Mr. Morris, since the change of the election laws which require an independent candidate's signatures to be filed seventy days in advance of a presidential election, in presidential years, presidential primary years, has an independent candidate for statewide office ever qualified for the general election ballot?

(Mr. Morris) No.

* * * * * *

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Maryland

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND,
ET AL.,

Appellants,

v.

BRUCE BRADLEY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District

Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

OPINION BELOW

The Opinion and Order of the District Court are set forth in the Appendix of the appellants' jurisdictional statement at 1a and 14a, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement. However, appellees additionally assert 28 U.S.C. Sec. 1343(3) as a basis of jurisdiction.

QUESTIONS PRESENTED

Whether Maryland Code (1976 Replacement Volume), Article 33, Sec. 7-1(e) deprives the appellee candidate

and voters of rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution in that this statute requires independent candidates for statewide office to file petitions containing the signatures of 51,155 registered voters of Maryland with the county election boards on March 8, 1976, which date is 70 days prior to the primary election in Maryland and which is 239 days prior to the general election, in order for the independent candidate's name to appear on the ballot in the general election to be held in November, 1976.

STATUTES INVOLVED

Pertinent provisions of the Maryland Election Code are set forth in the appellants' jurisdictional state-

ment at 19a.

STATEMENT OF THE CASE

Appellees will accept the Statement of the Case which appears in the appellants' jurisdictional statement at 3-11. However, two caveats must be made. First, in the Statement of the Case and elsewhere, appellants seriously misstate in several aspects the opinion of the District Court. For instance, whereas appellants claim that the District Court did not weigh alleged compelling state interests (Jurisdictional Statement at 9), the District Court analyzed all legitimate proffered state interests (See Opinion of District Court, Appellants' Jurisdictional Statement 6a-8a). Appellees commend for this Court's consideration the actual opinion of the District Court rather than the appellants' interpretation of that opinion. Second, appellants' jurisdictional statement relies heavily on the testimony of its expert witness, Richard

Smolka, who was termed a "qualified expert on the law and conduct of elections". (Jurisdictional Statement at 6-7, 19-21). The appellants fail to point out that while being subjected to voir dire at the hearing before the District Court, Smolka admitted that he had never been a political candidate, had never managed a political campaign, had never managed a petition drive, had never actively participated in a petition drive, and indeed had never solicited one signature on a single nominating petition. Although Witness Smolka survived a motion to strike his testimony at hearing, the District Court stated that his testimony had been substantially impeached.

Again, Appellees commend for this Court's consideration the opinion of the District Court for the factual analysis of this case and urge this Court not to rely upon the appellants' interpretation of its own evidence.

ARGUMENT

In order for an independent candidate for statewide office in Maryland to have his name placed on the ballot in November, 1976, it was necessary for the independent candidate to deliver to the county election boards of the State on March 8, 1976, petitions to which were appended the signatures of 51,155 registered voters of Maryland. March 8, 1976, is 70 days prior to Maryland's primary election, and 239 days prior to the general election to be held in November. If the

independent candidate successfully filed those signatures in March, he would not take part in the primary election. Rather, his name appears as of right on the ballot for the general election.

The District Court found that this statute violated the cor stitutional rights of the plaintiffs below in that the early filing provision placed an undue burden on the exercise of First and Fourteenth Amendment rights. That decision is manifestly correct and should be affirmed without further argument.

Appellees submit that the decision below was fully supported by a recent order of this Court in Tucker v. Salera, ____ U.S. ____, 96 S.Ct. 1451

(1976), affirming Salera v. Tucker, 399 F. Supp. 1258 (E.D. Pa. 1975).

Salera involved a Pennsylvania statute which was challenged on grounds that the statute required the filing of nominating petitions by certain candidates 218 days before the general election and required that all signatures be gathered for those petitions during a three week period only.

The Salera District Court faced the two questions separately. First, the District Court considered the constitutionality of the brief three week signature collection period and, relying upon Storer v. Brown, 415 U.S. 724 (1974), found that collection period constitutional. 399 F. Supp. at 1265.

The Salera District Court then

passed on to the second constitutional challenge -- that the requirement for filing signatures on nominating petitions at a date 218 days in advance of the election was constitutionally impermissible. There is no doubt that this issue was considered by the Salera District Court completely separately from the issue of the brevity of the three-week collection period. The District Court stated that:

> The second half of plaintiffs' challenge to Sec. 2913(b) and Sec. 2913(c) -- that the period for gathering signatures on nominating petitions is so remote from the general election that it substantially impairs plaintiffs' ability to appear on the ballot or to vote for otherwise qualified candidates -- raises different issues than were raised by plaintiffs' challenge to

> the three-week limitation. 399 F. Supp. at 1266 (emphasis added).

Following this severance of issues, the Salera District Court held that the requirement for filing signatures on petitions by a date far removed from the general election was unconstitutional. 399 F. Supp. at 1269.

Salera was appealed by the State of Pennsyvania to this Court, and, on motion of the plaintiffs in Salera, this Court affirmed the decision below. Tucker v. Salera, ____ U.S. ____, 96 S. Ct. 1451 (1976).

The District Court decision in Salera is binding in the instant case due to the summary affirmance by this Court (1) if the issue necessarily

affirmed by this Court in Salera is the same issue present in the Bradley litigation; (2) if the two cases are factually indistinguishable, and (3) if Maryland has proffered no valid state interests in support of its legislation which were absent in Salera. See Hicks v. Miranda, 422 U.S. 332 (1975); Opinion of the District Court, Appellants' Jurisdictional Statement at 8a.

Appellees submit that the above requisites are present in the instant litigation and that the Bradley District Court properly applied Salera to the instant case.

First, it is clear that the District Court in Salera decided one and only one issue. As described above,

the Salera District Court expressly divorced the issue of the three week time limitation from the issue of the early filing date. Only the latter issue was utilized by the Salera District Court to find the statutory scheme unconstitutional and only that latter issue was necessarily affirmed by this Court. The issue decided by the Bradley District Court was the burdensome nature of an early petition filing date, the exact issue determined in Salera.

Second, Salera is factually indistinguishable on the determinative issue in the case. In Salera, the District Court found unconstitutionally burdensome a filing date for nominating petitions which was 218 days prior to

the general election. In Bradley, the filing date for petitions is 239 days prior to the date of the general election -- an even more onerous requirement than that found unconstitutional in Salera.

Third, Maryland presented the Court with no valid state interests which were absent in Salera. After discussing the state interests alleged and found unpersuasive in Salera, and finding them equally unpersuasive in the Bradley litigation, the Bradley District Court considered and dismissed an additional state interest which Maryland asserted in an attempt to slide the case from under the Salera decision. See Opinion of the District Court, Appellants' Jurisdictional Statement at 9a. That additional

alleged state interest was the purported concern that Maryland treat its partisan and non-partisan candidates alike. The State asserted that since partisan candidates must file a certificate of candidacy on March 8, 1976, that independents should be required to file their petitions on March 8, 1976. This treatment, however, could not be more unequal. While partisan candidates merely sign certificates indicating their intention to run for office and need not file any petitions, Bradley was required to file petitions containing 51,155 signatures on that date. If there is a state interest to be served in treating partisan and non-partisan candidates alike, the present statutory scheme does not serve that

interest. The unequal treatment is obvious and was so recognized by the Bradley District Court.

The correctness of the decision in the Bradley District Court could not be clearer. The decision recognized the vitality and dispositive nature of the Salera case and painstakingly analyzed Salera to determine if there were any distinguishing features. The Bradley District Court, finding no meaningful distinctions between Salera and Bradley, applied Salera as binding law in the case. The reliance on Salera by the Bradley District Court was a proper application of a case which had been summarily affirmed by this Court. Hicks v. Miranda, supra. The Opinion in Bradley presents this Court with a case clearly

calling for summary affirmance.

The Bradley District Court decision also complied with more traditional case law of this Court.

A long line of cases has indicated that substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless they are essential to serve a compelling state interest. Storer v. Brown, 415 U.S. 724, 729 (1974); see e.g., American Party of Texas v. White, 415 U.S. 767, 780 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Bullock v. Carter, 405 U.S. 134, 144 (1972); Kramer v. Union Free School District, 395 U.S. 621, 627 (1969). The Bradley District

Court duly followed this Court's admonitions and fully considered all facially legitimate state interests proffered by Maryland. Those state interests were found to be adequately protected by other mechanisms which did not impinge on the Plaintiffs' rights or, subsequent to the District Court's scrutiny, were deemed by the District Court not to present a compelling state interest at all. See Opinion of the District Court, Appellants' Jurisdictional Statement, 6a-9a.

Finally, we are instructed by this Court that the actual history of candidates' success in gaining ballot placement under the constraints of state statutes is valuable in determining whether those statutorily imposed constraints are constitutionally per-

missible:

> Past experience will be a helpful, if not always an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. (Storer v. Brown, 415 U.S. 724, 742 (1974)).

In effect, the proof of the pudding is in the tasting. In Maryland, no independent candidate has ever qualified through the nomination by petition process for ballot placement for a statewide office where, as here, the independent must file his nominating petitions in March for a general election to be held in November.

CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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August 27, 1976

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

OPINION BELOW

The District Court issued its opinion on May 17, 1976. The opinion has not yet been reported but is reprinted at pages 1a to 13a of the Appendix to the Appellants' Jurisdictional Statement (AJS. 1a).[1]

[1] References to the Appendix to the Jurisdictional Statement will be cited as "AJS.," and references to the Appendix to this Brief for Appellants as "A." The pagination in the Appendix to the Jurisdictional Statement is in the form "1a, 2a, 3a, . . ." while that of the Single Joint Appendix is "1A, 2A, 3A, ..."

JURISDICTION

The jurisdiction to entertain this appeal from a decision of a United States District Court sitting as a court of three judges, is premised upon 28 U.S.C. §1253. The judgment of the District Court was entered on June 2, 1976. Appellants noted an appeal two days thereafter and probable jurisdiction was noted by this Court on October 4, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Maryland Code (1976 Repl. Vol.) Article 33, §7-1(e), the statute which the District Court determined was unconstitutional, reads as follows:

> ". . . Any paper which is to form a part of a certificate of candidacy shall be submitted to the board for the county or the City of Baltimore in

> which the signers on the paper are alleged to reside. The board shall give to anyone submitting any such paper or papers a signed receipt stating that the paper or papers are on file with the board. It shall be the duty of the several boards in the jurisdiction in which the signers are alleged to be registered voters to verify the number of legitimate signatures of persons who are registered voters. On any petition, including an associated or included set of petitions, submitted to the board, any question concerning the invalidity of the signature of any person on the petition affects that signature only and does not affect or impair any other portion of the petition or petitions. Following the verification, a duly authorized employee of the board shall endorse on each paper the number of signatures verified by the employee and shall endorse and sign the paper. For the purpose of the endorsement, each paper shall contain a blank space for the endorsement. *The papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election should be held under the primary election law,* or in the case of candidates for an office to be filled pursuant to §22-1(b) of this article, the papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is three weeks or twenty-one days before the day on which the special primary election is to be held under the Governor's proclamation setting the date for the special primary election. All papers delivered to a board pursuant to this subsection and required to be filed with the State Administrative Board of Election Laws pursuant to §4A-2 shall, after verification and endorsement as herein required, be mailed or delivered by the board to the State Administrative Board of Election Laws, on the Monday which is five weeks or thirty-five days before the day on which the primary election should be held under the primary election law or, in the case of candidates for an office to be filled pursuant to §22-

> 1(b) of this article, on or before the Monday which is two weeks or fourteen days before the day on which the special primary election is to be held under the Governor's proclamation. The State Administrative Board of Election Laws shall determine the sufficiency of the percentage of registered voters signing petitions in those cases in which candidates file certificates of nomination or of candidacy in its office. In all other instances, such determination shall be made by the local boards." (Emphasis added).

This statute, which was reenacted with minor revisions by the Maryland General Assembly, effective July 1, 1976, now appears as Maryland Code (1976 Repl. Vol., 1976 Cum. Supp.) Article 33, §7-1(e) through (m). Also relevant to this case are the remaining provisions of §7-1 and certain portions of Article 33, §§4A-1, 4A-3 and 5-2. These statutory provisions are reprinted at pp. 19a-23a of the Appendix to Appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether decisions of this Court require that the constitutionality of the uniform deadline under Maryland law for filing nominating petitions in a Presidential election year (seventy days before the primary election) be gauged in conjunction with other elements of Maryland's system of gaining a place on the general election ballot rather than in isolation?

2. Whether that statutory deadline, viewed in isolation or in the context of the overall regulatory scheme for State ballot access, constitutes an unconstitutional denial of Appellee Bradley's right to obtain a place on the general election ballot and of the other Appellees' asserted right to have the candidate's name appear on that ballot?

3. Whether the summary disposition principles articulated in *Hicks v. Miranda*, 422 U.S. 332 (1975) required the District Court in this case to adopt the precise reasoning of the lower court's opinion in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975) aff'd summarily sub nom, *Tucker v. Salera*, U.S. , 96 S. Ct. 1451 (1976) and relieved it of its duty to distinguish and harmonize prior summary affirmances and written decisions of this Court upholding the constitutionality of similar uniform filing deadlines?

STATEMENT OF THE CASE

With full knowledge of the strong field of party candidates from which his likely general election opponents were to come, Appellee Bruce Bradley, in the spring of 1975, decided to run as an independent candidate in Maryland for the United States Senate in 1976 (A. 50A-51A). In the fall of 1975 Bradley and his supporters began circulating petitions to obtain the necessary signatures for him to appear on the 1976 general election ballot in Maryland (A. 20A). Needing 51,155 signatures to qualify (3 percent of the State's registered voters determined as of four months before the primary), Bradley submitted 53,239 signatures to the local election boards for validation on March 8, 1976 (A. 39A). On the same date — the filing deadline for all State candidates including those campaigning in the party primaries — he filed a certificate of candidacy for the Senate seat. This filing deadline is fixed by law at 70 days before the primary election and occurs in early July (approximately 120 days before the general election) in non-Presidential election years and in early March (approximately 230 to 240 days before the general election) in years when voters make their nomination selections in a May Presidential Preference Primary.

Following the normal signature verification process, the State Administrative Board of Election Laws notified Bradley on April 15, 1976 that his petition papers contained only 42,049 valid signatures and were thus insufficient to gain him a place on the general election ballot (A. 23A). Signatures had been invalidated for various reasons, many having been offered by persons not registered to vote, or by persons who did not reside in the county indicated on the petition sheet, or by persons who had previously signed the petition (R. 49).

Two weeks later Bradley and various supporters who alleged only their status as petition signators or persons desirous of having the candidate's name on the general election ballot filed suit in the United States District Court for the District of Maryland. They contended in their complaint that their constitutional rights had been violated in that the remoteness of the early March candidate filing date from the date of the general election, standing by itself, placed an "unconstitutionally heavy burden" on Bradley's ability to be nominated by petition in a Presidential election year and thus restricted his First Amendment right of political association, "unconstitutionally impacted the Plaintiffs' right to vote" by unduly limiting the number of potential candidates for elective office and violated the Equal Protection Clause of the Fourteenth Amendment in that party primary candidates need not comply with the petition requirement while "independent candidates must comply with the unnecessarily burdensome requirement of filing nominating petitions at a date far removed from the date of the general election".

Appellees also challenged certain aspects of the signature validation procedures and other practices of the local election boards as "exacerbating the remote-

ness of the filing deadline". However, this issue was neither pressed by Appellees nor decided by the lower court.

At the hearing before the three-judge panel, Appellees introduced affidavit testimony designed to show that Bradley had encountered difficulties in his efforts to obtain media coverage (A. 18A) and to appear before various organizations prior to the filing deadline, with several of the latter indicating that he might appear later with other candidates running in the primary election (A. 27A-30A). Some testimony was offered as to the alleged difficulties inherent in circulating petitions in winter weather and during the Thanksgiving and Christmas holiday seasons (A. 22A). Finally, Appellee Bradley's affidavit indicated difficulty in approaching potential petition signers far in advance of the general election when the issues which were then current might not be the most important issues in November (A. 17A). While Appellees premised their constitutional attack on the 70 day pre-primary deadline solely on its remoteness from the *general election*, virtually all of their evidence and argument advanced before the District Court focused on the difficulties of gathering petition signatures more than 70 days before the *primary election*.

The State introduced evidence demonstrating that while independent candidates must file their petitions by the same early date on which all candidacies must be perfected, they are favorably treated under various other provisions of State law generally beneficial to independent candidacies and enjoy certain inherent practical advantages over party primary candidates. This evidence established that:

1. Maryland law places no limit whatsoever on the period during which signatures can be gathered prior to

the filing deadline, and an independent candidate may gather petition signatures months and even years before the deadline.

2. Persons signing nominating petitions for independents may be affiliated with the major parties and are not disqualified from voting in the primary elections.

3. Signatures are required of only 3 percent of the registered voters eligible to vote for that office — a figure substantially less than the maximum heretofore sustained by this Court.

4. Signers do not have to state their intention to vote for the candidate.

5. Petitions may be circulated by non-residents and persons not registered to vote in Maryland.

6. Because of Maryland's liberal registration by mail statute (Art. 33, §3-1), independents may simultaneously approach signators and furnish them with a registration by mail form which need only be completed and mailed to complete registration (A. 32A-36A).

In addition, Professor Richard Smolka of American University, a qualified expert on the law and conduct of elections, testified that an independent candidate seeking signatures would have an easier time gathering signatures before the heat of the primary election campaign, by which time many voters have crystalized their views as to the candidates (A. 33A). He further testified that unlike a primary candidate, an independent does not have to defeat an opponent to get on the general election ballot, usually spends less money, must gather fewer signatures than a primary candidate needs votes, and does not have to urge frequently reluctant voters to the polls but can obtain their "vote" for nomination on the spot. He also noted that the

petition signer is asked to take the relatively easy step of supporting a candidate without prejudice to his ability to vote to nominate another, whereas the primary candidate must convince his electorate to support him to the exclusion of his opponents. Finally, Professor Smolka noted that because of the large financial investment usually required of primary candidates and the State and federal regulation of campaign spending and contributions, primary candidates have a greater need than independents to know the field of candidates at an early date "in order to make intelligent decisions relative to the solicitation of contributions and the expenditure of monies during the primary election campaign" (A. 33A-35A). Professor Smolka's testimony was supported by Willard A. Morris, the State Administrator of Election Laws (A. 41A).

The State also established that during the last gubernatorial election in Maryland (1974) five persons qualified as independent candidates for the Maryland House of Delegates and three for the State Senate via the nomination by petition route (A. 43A-44A), and that in 1976 two persons gathered sufficient signatures by March 8 to qualify for the general election ballot as candidates for the United States House of Representatives (A. 60A-61A). As already noted, Mr. Bradley himself would have qualified had a higher percentage of his submitted signatures been valid.

The State of Maryland asserted as substantial or sufficient numerous State interests served by the simultaneous filing deadline for primary candidates and independents. These included:

1. The prevention of frivolous and fraudulent independent candidacies maturing only after the conclusion of the primary elections.

2. The elimination of voter confusion caused by late blooming candidacies, a consideration especially important in a Presidential year when political activity is both more intense and more long lasting.

3. The need to insure that both party primary candidates and independent candidates, including those who obtain general election ballot access, are afforded relatively comparable treatment and that neither are given an unfair advantage.

4. The fostering of public discussion of campaign issues among *all* candidates when voter interest is at its zenith, rather than allowing independent candidacies to remain embryonic or dormant until the primaries have ended.

5. The prevention or alleviation of the administrative problems that might surface if the petition verification process and likely challenges (such as this one) were telescoped into a shorter and later period of time.

6. The promotion of these interests while still preserving the right of Maryland voters to express themselves early in a Presidential election year as to their choice for Presidential nominees.

On May 17, 1976, the court issued its opinion, holding that the filing deadline of Section 7-1(e) standing by itself constitutes "an unconstitutional burden on Bradley's right to become an independent candidate and on the rights of the other plaintiffs to exercise their right to vote" (AJS. 12a) and that Bradley had a constitutional right to collect the requisite number of valid signatures until the date of the primary election. The court made no attempt to analyze the evidence presented on the relative burdens of independents and primary candidates, to weigh all of the State interests advanced or to focus on the filing deadline in light of other provisions of State law, but concluded that its decision was controlled legally and factually by the

opinion of the three-judge district court in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd sub nom. Tucker v. Salera*, 96 S. Ct. 1451 (1976). (AJS. 6a).

Even though the statute at issue in *Salera*, unlike the open-ended Maryland law, allowed a scant three week period for the gathering of signatures, even though much of the language in the *Salera* opinion seemed to indicate that the three-judge court there struck down the Pennsylvania filing deadline by viewing it in conjunction with the brief signature gathering period, and even though the practical effect of the *Salera* decision was to eliminate the three week limitation for the plaintiffs in that case, the *Bradley* court was convinced that both the Pennsylvania panel and this Court, without giving any weight to Pennsylvania's questionably short signature gathering period, had struck down in isolation the filing deadline for independents of 218 days before the general election (AJS. 9a). The lower court here rejected the proffered compelling interests asserted by Pennsylvania in *Salera* (administrative convenience, misuse of the nomination by petition procedure by defeated primary candidates and the promotion of intelligent voting through voter knowledge of candidates) as if they were simply being reasserted by Maryland (AJS. 6a-8a). In addition, the court held that Maryland's simultaneous filing deadline for independents and primary candidates could not be justified on a comparable or equal treatment theory.

In response to the State's argument that the constitutionality of Section 7-1(e) had been sustained by recent prior decisions of three-judge panels in Maryland, which had been summarily affirmed by this Court (*Auerbach v. Mandel*, Civil No. 71-141-N (D. Md. March 3, 1972), *aff'd* 409 U.S. 808 (1972) and *Maryland*

People's Party v. Mandel, Civil No. 72-865-K (D. Md. September 5, 1972), *aff'd* 410 U.S. 907 (1973)) and was fully supported by summary affirmances of decisions from other jurisdictions (*Socialist Labor Party v. Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan,* 409 U.S. 942 (1972); *Pratt v. Begley,* 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1972); *Jackson v. Ogilvie,* 325 F. Supp. 864 (N.D. Ill.), *aff'd* 403 U.S. 925 (1971)), the District Court said that language in its earlier opinions regarding the Section 7-1(e) filing deadline, while "it seemed to reflect the law at the time it was uttered", was "pure dictum". (AJS. 11a.) The lower court went on to express its belief that while the question had been presented in the *Auerbach* and *Maryland People's Party* Jurisdictional Statements and Motions to Affirm, the Supreme Court had not yet decided the question of the constitutionality of the Maryland filing deadline in summarily affirming those decisions (AJS. 11a).

Finally, the District Court felt that under *Hicks v. Miranda,* 422 U.S. 332 (1975) it was bound to follow its own perception of the last summary affirmance of this Court, despite less recent summary affirmances and written opinions of this Court to the contrary.[2]

SUMMARY OF ARGUMENT

The District Court erroneously concluded that Maryland's statutory deadline for filing nominating petitions (Maryland Code, Article 33, Section 7-1(e)) excessively burdened Appellee Bradley's First Amendment right to associate for political purposes and the other Appellees'

[2] In addition to the cases cited, *supra,* the *Bradley* court denigrated as "no longer the law" on the constitutional treatment of pre-primary deadlines the written opinions of this Court in *Jenness v. Fortson,* 403 U.S. 431 (1970) and *Williams v. Rhodes,* 393 U.S. 23 (1968). (AJS. 11a).

right to vote effectively so as to discriminate against independent candidates.

Applicable Principles

Decisions of this Court require lower courts to weigh the constitutionality of a filing deadline for independent candidates in conjunction with other elements of the State's system of general election ballot access and in the light of the actual experience of independent candidates in obtaining a place on the ballot. *Storer v. Brown,* 415 U.S. 724 (1974); *Jenness v. Fortson,* 403 U.S. 431 (1970); *Auerbach v. Mandel,* 409 U.S. 808 (1972). The District Court in this case ignored these principles by examining Maryland's filing deadline in isolation and by failing to note the significant number of independent candidates who qualified for access to the general election ballot in 1974 and 1976 or the fact that Appellee Bradley filed the requisite amount of signatures by the deadline at issue in this case.

"Burdens" Of Section 7-1(e) Deadline

Only excessively or severely burdensome ballot access requirements merit constitutional scrutiny. *Storer v. Brown, supra.* Maryland's uniform pre-primary filing deadline does not place an excessive burden on an independent's constitutional rights because signatures can be gathered months or years before the deadline and the State's nomination by petition process imposes no "suffocating restrictions" upon the free circulation of nominating petitions. Moreover, in many respects independent candidates in Maryland have an easier route to the general election ballot than primary candidates. And the evidence in this case demonstrates that Bradley's initial failure to obtain a place on the general election was due more to

the inefficiency of his petition circulation campaign than to the Section 7-1(e) filing deadline.

Discrimination Against Independents

Maryland's uniform pre-primary filing deadline does not discriminate against independent candidates. Decisions of this Court recognize that uniform filing deadlines promote equal treatment for all candidates. *Jenness v. Fortson, supra; Pratt v. Begley,* 409 U.S. 943 (1972); *Auerbach v. Mandel, supra.* Instead of Maryland's workable scheme for adjusting the relative burdens of obtaining general election ballot access, the District Court has created a system that unjustly discriminates against primary candidates and imposes greater hardships on all candidates.

Substantial State Interests Justify The Section 7-1(e) Deadline

Whatever burdens may be placed on independent candidates by Section 7-1(e) and whatever discrimination may be said to arise from Maryland's filing deadline are supported by numerous substantial interests, including the prevention of frivolous or fraudulent candidacies, the promotion of voter and candidate knowledge of all general election candidates at the same time, the fostering of an even-handed system of ballot access which prevents independents and primary candidates from obtaining an unfair advantage, the stimulation of public discussion among all candidates when voter interest is at its zenith and the preservation of the right of Maryland voters to be heard at an early point in a Presidential election year as to their choice for Presidential nominees.

Precedential Effect Of Salera v. Tucker

The lower court erred in concluding that the summary disposition principles articulated in *Hicks v. Miranda,*

422 U.S. 332 (1975) required it to adopt its perception of the precise reasoning of the lower court opinion in *Salera v. Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975) aff'd sub nom. *Tucker v. Salera,* 96 S. Ct. 1451 (1976) and to overrule five summary affirmances and two written Supreme Court decisions supporting the constitutionality of filing deadlines such as that set forth in Section 7-1(e). *Hicks* applies to summary dismissals, not summary affirmances; it involved a federal court's disregard of a prior summary dismissal of an appeal from a state court decision upholding the constitutionality of the same statute before the federal court. But even if *Hicks* is held to apply to summary affirmances, it does not relieve a lower court of its obligation to distinguish and harmonize prior summary affirmances and written decisions of this Court. Finally, the District Court here disregarded numerous opportunities to distinguish *Salera* and avoid a draconian reversal of a long line of cases which support the constitutionality of Maryland's uniform pre-primary filing deadline.

ARGUMENT

I.

DECISIONS OF THIS COURT REQUIRE THAT THE CONSTITUTIONALITY OF SUBJECTING INDEPENDENT CANDIDATES TO MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE BE GAUGED NOT IN ISOLATION BUT IN CONJUNCTION WITH OTHER ELEMENTS OF THE STATE'S SYSTEM REGULATING ACCESS TO THE GENERAL ELECTION BALLOT AND IN LIGHT OF THE ACTUAL EXPERIENCE OF INDEPENDENT CANDIDATE BALLOT ACCESS.

Out of respect for the diversity which is the hallmark of State election laws, this Court has always focused on the overall statutory scheme regulating ballot access and has eschewed any rule automatically invalidating isolated provisions of State law alleged to burden an

independent's rights. In *Storer v. Brown*, 415 U.S. 724, 730 (1974) this Court said:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' What the result of this process will be in any specific case may be very difficult to predict with great assurance." (Citations omitted).

In *Storer*, the Court ordered a three-judge federal panel to weigh the constitutionality of California Election Code provisions requiring an independent candidate to file petitions signed by five percent of the entire vote in the preceding election and gathered over a particular twenty-four day period *in conjunction with* a statute which disqualified voters who voted in the primary from signing an independent's petition. At the same time, the Court indicated that the only exception to the rule requiring courts to assess the "totality" of election laws as they affect constitutional rights was when a single challenged statute "absolutely barred" a candidate from the ballot and the facial validity of the provision was questioned. 415 U.S. at 737.[3]

[3] This exception to the totality rule appeared almost as a rule of standing so as to prevent candidates validly barred by one election law provision from challenging others.

As a practical matter, candidate or nominating petition filing deadlines are not absolute bars to an independent candidacy, for, in the words of *Storer*, they do "change [their] character when combined with other provisions of the electoral code". *Id.* at 737.[4] In addition, this Court has always viewed such statutory provisions in conjunction with other features of state election laws in gauging their effect on a candidate's constitutional rights. For example, in *Jenness v. Fortson*, 403 U.S. 431 (1970), this Court upheld the constitutionality of a five percent signature gathering requirement as coupled with a 180-day signature circulation period ending sixty-nine days before the primary and five months before the general election and various other statutory provisions which fostered the "open quality" of the State electoral system. *Id.* at 439. And in *Williams v. Rhodes*, 393 U.S. 23 (1968), a candidate filing deadline was struck down but only in conjunction with restrictive provisions of Ohio law which made it virtually impossible for a nonparty candidate to obtain ballot access. Moreover, in the specific context of Maryland's nomination by petition law, this Court has apparently examined the filing deadline at issue in this case as it operates in tandem with other state election law provisions. In *Auerbach v. Mandel*, No. 72-141-N (D. Md. March 3, 1972), aff'd 409 U.S. 808 (1972), the only portion of Section 7-1(e) challenged was the filing deadline set therein. Jurisdictional Statement, at 12; *Auerbach v. Mandel, supra.* Yet this Court indicated in *Storer* that it had also approved the signature percentage requirement of Section 7-1(e) in affirming *Auerbach*, 415 U.S. at 739 N. 10.

[4] The District Court in *Bradley* made no explicit finding that Maryland's filing deadline was "facially invalid". It merely declared that "Plaintiffs are being deprived of their constitutional rights *by the operation of Section 7-1(e)*". (Emphasis added). (AJS 14a).

In mandating that the alleged burdens of a particular election law provision, such as a filing deadline, be gauged in tandem with other election code features, this Court has charged lower courts to inquire into the "nature, extent and likely impact" of the requirements, *Storer v. Brown, supra,* at 738, and to look to actual experience as an unerring guide of the extent of the burdens imposed by the statutory scheme. *Id.* at 742; *Jenness v. Fortsen, supra,* at 439. See also *Buckley v. Valeo,* U.S. , 46 L. Ed. 2d 659, 735 (1976).

Moreover, this Court has never indicated that all restrictions or burdens placed on the access of nonparty candidates to the ballot affect constitutional rights. Only "excessively" or "severely" burdensome requirements and "substantial" restrictions call constitutional examination into play. See *Storer v. Brown, supra,* 415 U.S. at 729, 738. And even "substantial" restrictions on the right to vote or to associate are not subject to automatic invalidation. It is only when the restrictions severely burden the right to associate for political purposes and the right to vote effectively that discrimination against independent candidates must be justified by the showing of compelling state interests. *Id.* at 729.

These pronouncements and the analytical methodology they require were totally ignored by the lower court in its rush to read *Salera* as signaling a fundamental change in this Court's attitude toward state laws governing minor party or independent candidacies. Under the lower court's inflexible invalidation of pre-primary deadlines, even a statutory scheme requiring that a mere 50 signatures be gathered to obtain general election ballot access would be determined to be excessively burdensome if the signatures must be filed by a specified date weeks or months before the state's primary elections.

The fundamental unsoundness of considering the statutory deadline in isolation rather than as a part of the overall scheme is further highlighted by the lower court's fashioning of a rule which ignores the actual experience of independent ballot access in Maryland. History has proven that non-major party candidates have fared well in Maryland (A. 41A-49A). For example, eight local candidates qualified as independents under Maryland's nomination by petition procedure in 1974 (which was the same as it is now), and two Congressional candidates filed the requisite number of valid signatures by the March 8 deadline in 1976. Even Appellee Bradley filed more than the required number of signatures by the deadline at issue in this case; his quest for a place on the ballot without the help of the courts was stymied because a number of those signatures were invalid. The evidence before the lower court indicated that his inability to qualify as a candidate was due at least as much to his failure to conduct a sufficiently vigorous and efficient petition campaign as it was to the March deadline.[5]

In short, this Court's requirement that actual experience be examined in determining the burden of a ballot access restriction was deliberately ignored by the lower court. See *Storer v. Brown, supra,* at 742; *Jenness v. Fortson, supra,* at 439.

II.

WHETHER VIEWED IN ISOLATION OR IN THE CONTEXT OF THE OVERALL REGULATORY SCHEME FOR STATE BALLOT ACCESS, MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE DOES NOT PLACE EXCESSIVE OR SUBSTANTIAL BURDENS ON THE RIGHTS OF INDEPENDENT CANDIDATES.

In 1969, in a substantial reform of the Maryland election laws, Maryland voters were given the right to

[5] See p. 27 *infra.*

vote for their preference for candidates for President and to elect delegates to the National Party Conventions held during the summer. Chapter 560 of the Laws of 1969. This reform replaced a convention system where the voters had no direct voice in selecting the party nominee for President. As a matter of course, the Presidential Preference Primary must take place a reasonable amount of time before the National Convention and thus the General Assembly selected the third Tuesday in May as the date for such primaries. Maryland Code, Article 33, Section 5-2(a). In non-Presidential election years, Maryland's primary elections are held on the second Tuesday after the first Monday in September. *Id.*

At the same time, substantial revisions were made to the provisions of Maryland law governing nomination by petition by Chapter 554 of the Laws of 1969. For the first time party primary candidates were placed on exact parity with independent candidates with respect to filing deadlines. For at least two decades party primary candidates have had to file their certificates of candidacy 10 weeks or 70 days before the primary. Prior to the 1969 change, the deadline for the filing of nominating petitions had been 30 days later than that for primary candidates — independents had to file only 40 days before the primary election. In 1969, the 10 week or 70 day provision was also made applicable to independent candidates seeking nomination by petition, who thereby were required to file by the same deadline their certificate of candidacy accompanied by the requisite number of signatures.

In addition, certain long-standing "burdens" placed on those circulating nominating petitions were eliminated by Chapter 554. Gone were the former requirements that signers state their intention to vote for the

person nominated (a feature still found in some state laws)[6] and specify the precinct or district where registered[7] and that the affiant certify that he knew the signers to be registered voters of the specific precinct as set forth in the petition. The requirement that independent candidates publish their petitions was also abandoned.[8] These reforms eased the burden of the nomination by petition process in Maryland which was already more liberal in many respects than under other state election laws. For example, persons signing petitions may be members of a party and their signing will not disqualify them from voting at a primary or general election in any way they wish; and the affiant gathering and submitting signatures does not have to be a registered voter or a state resident. Most importantly the time period for petition gathering in Maryland is open-ended. Independent candidates may gather signatures months, even years in advance of the filing deadline.[9]

[6] Although this declaration was regarded by Maryland courts as not legally binding on a voter, *Munsell v. Hanwegan*, 82 Md. 15 (1943), its psychological impact on a potential signer is incalculable.

[7] At one time under Maryland law signers had to specify their occupation and place of business on the petition. See Maryland Code (1951), Article 33, Section 44.

[8] In 1968 it cost third party candidate George Wallace $16,822 and independent senatorial candidate George P. Mahoney $10,160 to publish their petitions. If Appellee Bradley had been required to make such an expenditure, it would have cost him anywhere from one-third to one-half of his petition campaign budget of approximately $30,000. Transcript of Proceedings at p. 26.

[9] In 1969, the nomination by petition law was changed to require that the signatures of all nominating voters be submitted to the board with which they are registered. This change was prompted by the enormous difficulties which had been encountered in verifying major nominating petitions in 1968 (A. 42A) and was more than justified by the relaxation

The 1969 revisions of the Maryland nomination by petition law were soon challenged in court. In *Wood v. Putterman*, 316 F. Supp. 646 (D. Md. 1970), aff'd 400 U.S. 859 (1970), a third party which failed to generate a minimum required showing in a prior election unsuccessfully attacked the statutory requirement that it must obtain access to the general election ballot through the petition process. A key issue in the case was the alleged burden imposed by Section 7-1 of Article 33. Speaking for the majority of a three-judge panel, Circuit Judge Harrison Winter contrasted the Ohio statute struck down in *Williams v. Rhodes, supra*, with the Maryland nomination by petition law and noted that:

> "7-1 permits nomination by petition signed by only 3% of the total registered voters entitled to vote for the office for which the nomination is sought. *There are no other restrictions of any consequence*, except that no person may join in nominating more than one nominee for each office to be filled; nor may any person sign more than once for the same nominee for an office." (Emphasis added.) *Id.* at 649.

In 1972 a similar court challenge by a third party candidate squarely raised the constitutionality of the Section 7-1(e) filing deadline (which occurred two days earlier in 1972 than in 1976). In *Auerbach v. Mandel*, No. 72-141-N (D. Md. March 3, 1972), aff'd 409 U.S. 808 (1972), Judge Winter, speaking for a unanimous three-judge court, said that the March 6 filing deadline although a "heavy burden" was not "an unreasonable time". The court's order in that case expressly declared that the challenged provisions of the State election code including the candidate filing deadline "are not

of the requirements as to the information which must appear on the petitions and the need to allow the verification process to be completed in a prompt and efficient manner.

unreasonable or unconstitutionally burdensome and are not invalid."[10]

An analysis of the entire scheme for nomination by petition in Maryland demonstrates the correctness of these prior decisions. Unlike the statute at issue in *Salera v. Tucker, supra*, which gave a candidate and his supporters only 21 days to gather the requisite number of signatures, Maryland has an "open" signature gathering period. Until the deadline, candidates can spend months or years gathering signatures. Unlike the filing deadline in *Salera*, which was always fixed at approximately seven to eight months before the general election, Maryland's simultaneous filing deadline for independent and party candidates occurs approximately 120 days before the general election in non-Presidential election years[11] and 230 to 240 days before the general election in a Presidential election year only because in those years the *entire electoral process* is "stepped up" and given an early start to afford Maryland voters the opportunity to voice their preference in the Presidential primaries and thereby exert some influence at the summer conventions. In addition, Maryland's nomination by petition process imposes no "suffocating restrictions" upon the free circulation of

[10] The language of the district court's order in *Auerbach* belies the suggestion of the *Bradley* court that *Auerbach* did not decide the constitutionality of the Section 7-1(e) filing deadline. Moreover, an examination of the jurisdictional statements in the *Auerbach* case and in *Maryland People's Party v. Mandel*, Civil No. 72-865-K (D. Md. September 5, 1972), aff'd 410 U.S. 907 (1973), discloses that this issue was clearly presented to this Court.

[11] A deadline ending 150 days before the general election was sustained in *Jenness v. Fortson*, 403 U.S. 431 (1970); and quite conceivably the 120 day provision in non-Presidential election years can be justified on the basis of administrative convenience alone. *Cf. American Party of Texas v. White*, 415 U.S. 767, 787 n. 18 (1974).

nominating petitions and in this important respect strikingly resembles the Georgia statutory scheme scrutinized and upheld in *Jenness v. Fortson,* 403 U.S. 431, 439 (1970):

> ". . . a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand is a person who was not even registered at the time of the previous election."

In no way can it be said that Maryland's statutory scheme operates "to freeze the political status quo." *Id.* at 438.

Appellees' principal complaint below was not that the entire Maryland scheme for independent ballot access froze the political status quo, but that Maryland's filing deadline requires the independent candidate to make excessively early preparations for his candidacy; to, in effect, have finished his quest for a place on the ballot just as the primary candidates are beginning. This is sheer fiction. Few, if any, primary candidates who ex ect to win are just launching their campaigns on the filing deadline. In most cases a primary candidate has invested a substantial amount of time and labor prior to the filing date, and the evidence below establishes that this was the case with respect to the main contenders in the primary contests for the United States Senate seat sought by Bradley. Bradley was hardly alone among the various candidates when he sought out the voters in late 1975 and early 1976 (A. 51A).[12] (Transcript of

[12] In addition, in *Storer v. Brown, supra,* where this Court upheld a requirement that an independent candidate must not have been affiliated with a political party for a year before the primary, the Court rejected this very same type of burdensome "anticipation" argument:

"It is true that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible 11 months examined in *Rosario* [*v. Rockefeller,* 410 U.S. 752 (1973)] and its direct impact is on the candidate, and not voters." 415 U.S. at 734.

Proceedings at 51). In the same vein, Appellees contended that voters have no interest in a candidacy prior to the March 8th filing date. This is hardly tenable in a Presidential election year when political campaigns are on everyone's mind before the first snowfall in New Hampshire. As just noted, Bradley and his rivals were all approaching and appearing before the voters during this "remote" period, and Bradley did get more than 50,000 signatures on his petitions, and two Maryland independent candidates for the United States House of Representatives were able to generate enough voter interest in early 1976 to satisfy this same 3% requirement which Bradley fell short of. If an independent candidate is unable to generate sufficient interest in his campaign early in the year, he has himself to blame — not the system or the season.

A close examination of the burdens which Bradley alleges were imposed upon him as a result of the §7-1(e) filing deadline demonstrates the insubstantiality of his attack on the statute. Bradley stated that his independent candidacy was harmed because the issues debated during the petition gathering period might not be important in the 1976 general election (A. 17A). However, Bradley signature gatherers were instructed *not to discuss issues.* See Appendix C to Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order (R.). Their pitch for signatures centered on giving voters a greater array of choices on

the ballot. *Id.* And the closest signature gatherers came to discussing "issues" was their characterization of Bradley to voters who inquired as a candidate who was "liberal on people issues and conservative on money issues". *Id.* Appellants submit that in the face of such a record it remains to be seen how Bradley was harmed by shifting campaign issues.

Secondly, Bradley's petition campaign was allegedly damaged by the lack of press coverage (A. 17A). It is claimed that the lack of press coverage was due to the remoteness in time from the primary and general election campaigns. However, what newspapers will or will not print about *any* candidate is a speculative matter. Independent candidates who qualify for the general election ballot and primary candidates who have no real contest will often find themselves ignored by the media. In addition, there is no guarantee that a nomination by petition campaign would obtain greater press coverage if the independent filing deadline were extended to the date of the primary election. If anything, newspaper coverage of a petition gathering effort during the primary campaign might be even harder to obtain because of the attention focused on the primary. Conversely, there is no reason why the petition drive of independent candidates should be legally entitled to any derivative benefits flowing from increased media interest in primary election campaigns.

Thirdly, Appellees contended that the March filing deadline hampered Bradley's ability to obtain invitations to speak before groups (A. 27A-30A). Yet as Bradley's instructions to signature gatherers indicate, his petition campaign was keyed primarily to obtaining signatures at supermarkets, shopping malls, sporting arenas, etc. rather than at meetings and conventions.

Appendix C to Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order (R. 54). In addition, if the lack of speaking invitations before the filing deadline is a burden, it is one shared by primary candidates.

Finally, despite the fact that in 1976 Maryland had one of the mildest winters in its history (A. 43A), Appellees allege that cold and inclement weather and school vacation schedules during the fall of 1975 and the winter of 1976 burdened the Bradley signature gathering effort (A. 22A). If such considerations are to be given any weight in the constitutional equation, the course of constitutional adjudication will become as unpredictable as the weather.

As the nature of Appellees' excuses for the initial failure of Bradley's nomination by petition campaign indicate, the §7-1(e) filing deadline is not the cause of the candidate's problems. Rather, the evidence demonstrates that the inefficiency of the signature gathering effort was the prime reason for its failure. For example, Bradley's campaign manager testified with respect to the turmoil in the campaign organization (A. 20). In addition, Bradley paid signature gatherers on a per signature basis rather than for each valid signature (Transcript of Proceedings at 19-20) and suffered from an invalidation rate of over 20% (A. 39A). He did not use the postcard-registration technique to sign up unregistered voters (Transcript of Proceedings at 37). He also did not begin gathering signatures as soon as he could have and raised and spent far less than the principal candidates in the Democratic Primary. Transcript of Proceedings at 26-27.

In short, it was not pre-primary filing deadline which would have kept Bradley off the general election ballot,

but his failure to conduct a sufficiently vigorous and efficient petition campaign.

Moreover, the evidence below establishes that the pre-primary filing deadline for independent candidates is found to offer the independent a singular advantage in terms of gathering petitions because he will find it easier to collect signatures at that time. He does not encounter the voter resistance rampant in the heat of a primary or thereafter when voters' views have begun to crystalize regarding party candidates or when many voters have been "turned off" by excessive political activity. He is given his chance at a place on the general election ballot before the others have had an opportunity to capture the loyalty and commitment of the voters.

In many, but admittedly not all, respects the candidate seeking to obtain signatures on a nominating petition has an easier route to the general election ballot than candidates who must run in primary elections. The evidence offered by the State through Professor Smolka and Willard A. Morris, summarized above at pp. 8-9 establishes these advantages. First, the independent candidate does not have to defeat any particular opponent or opponents in order to gain a place on the general election ballot. Secondly, the number of signatures which he must obtain is almost invariably less than the number of votes which a candidate in a primary election must obtain in order to gain his party's nomination. Third, the independent candidate, at least in Maryland, is given a longer period of time in which to "campaign" for his nominating signatures — since the candidate in a primary election must focus his campaign during a period immediately prior to an election so as to have the greatest impact on the voters and on voter turnout, while the independent

candidate need only approach and appeal to a particular voter at a single moment in time (the moment when he asks for the signature) of the candidate's own choosing and, if rebuffed, may later return to that same voter to try again. Fourth, the choice made by a voter in a primary election is an irrevocable one in which he must choose one among several candidates, whereas the choice made by a voter signing a nominating petition is not irrevocable since the voter may withdraw his signature prior to the filing of the petition or may refuse to sign once and then sign when later approached and may, in any event, still vote for another candidate in his party's primary election. The fact that the choice is neither exclusive nor irrevocable in the case of the signing of a nominating petition makes it easier to persuade the voter to exercise that choice in favor of the candidate. And finally, the primary election candidate must get his supporters to physically go to the polls to vote for him whereas the petition candidate can go to the voters in their homes or elsewhere to get their votes.[13]

We do not mean to suggest that it is easy for an independent to gain a place on the general election ballot or, as the lower court suggested we had urged, that party and independent candidates have identical routes to the ballot. Indeed, neither the route to the general election ballot nor the path to ultimate victory is easy for any candidate.

[13] In addition, Maryland law does not control or restrict contributions or expenditures relative to the circulation of nominating petitions but does apply to primary election contributions and expenditures. While this distinction does not apply to candidates for federal office (like Bradley), it is true for all State office candidates.

Maryland does not question the tenet that State ballot access restrictions, including early filing deadlines, can in some cases substantially and unconstitutionally burden the rights of independent candidates and their voting constituency. *Williams v. Rhodes, supra.* Nor does the State challenge the *result* reached in *Tucker v. Salera, supra, viz.*, that a three week gathering period for signatures that ends eight months before the general election is unconstitutional. The State does contend that the Maryland filing deadline, when properly viewed in the context of the total regulatory scheme, is significantly different and less burdensome than the statute at issue in *Salera*[14] and that a thorough examination of the treatment accorded primary and independent candidates by Maryland law and of the problems inherent in either avenue to the general election ballot will demonstrate that "it is problematical at best which [alternative] is more onerous in fact." *American Party of Texas v. White, supra* at 783 n. 16, and that the Section 7-1(e) filing deadline is not "excessively" burdensome.

III.

MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE WORKABLY ADJUSTS THE RELATIVE BURDENS OF OBTAINING GENERAL ELECTION BALLOT ACCESS AND DOES NOT DISCRIMINATE AGAINST INDEPENDENTS.

In *Storer v. Brown, supra* at 729, this Court indicated that even if election law provisions are found to "excessively burden" the right to vote effectively and the right to associate for political purposes, these burdens must result in *discrimination* against an

[14] The State also contends that the justifications proffered for Maryland's uniform pre-primary filing deadline are different from and more substantial than those asserted in *Salera*. See pp. 35-39 *infra*.

independent candidate in order to call into play constitutional scrutiny.

It can hardly be contended that Maryland's scheme of requiring party primary candidates and independent candidates to file their certificates of candidacy at the same time constitutes discrimination such as to call into play substantial or compelling justification for the scheme. In numerous cases courts have pointed to this parity as an additional reason for upholding various state election schemes. For example, in *Jenness v. Fortson*, 403 U.S. 431, 433-34 (1970), this Court specifically acknowledged the parity defense in approving the Georgia election laws, when it stated:

> "The total time allowed for circulating a nominating petition is 180 days, and it must be filed on the second Wednesday in June, the *same deadline that a condidate filing in a primary must meet.*" (emphasis added).

See also *Storer v. Brown, supra*, at 733, where the Supreme Court noted of California's election scheme:

> "The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of independent candidates are very similar to, or identical with, those imposed on party candidates."

A uniform pre-primary filing deadline for all candidates was also present in *Jackson v. Ogilvie*, 325 F. Supp. 864, 867 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), where a challenge to Illinois' election laws was rejected, See also *Pratt v. Begley*, 352 F. Supp. 328 (1970), *aff'd* 409 U.S. 943 (1972) where a three-judge federal court upheld a filing deadline for independents which occurred seven months before the general election:

> "The statute is not unconstitutionally discriminatory. It does not make it any more difficult for an

> independent candidate to have his name placed on the ballot than a party candidate. The statute simply requires all potential candidates, whether Democrat, Republican or Independent, to file for nomination on the same date." 352 F. Supp. at 330.

See also *Auerbach v. Mandel, supra,* where the lower court in its oral opinion noted that Maryland's uniform filing deadline enabled *all* candidates "to be known at the same time."

Failing to observe that a Presidential election year places greater burdens on *all* Maryland candidates and that the State has a significant interest in equalizing these burdens, the lower court has fashioned a rule which affords advantages to independent candidates which are not available to primary candidates and ultimately places greater burdens on all candidates.[15]

[15] In *Jenness v. Fortson, supra,* at 440, this Court was distinctly aware of the fact that a state system of ballot access can discriminate against primary candidates and in favor of independents when it noted:

> "The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. Although the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot at the general election. Surely an argument could be well be made on behalf of the 10 who lost, that it is *they* who were denied equal protection vis-à-vis a candidate who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate."

In addition, the District Court decision stands as a warning to states that they dare not attempt, even for the ultimate benefit of the voters and the electoral process, to place party candidates and independents on an equal or comparable footing lest they risk a finding of unconstitutional discrimination.

For example, the lower court in *Bradley* belittled the primary candidate's need to know the identity of the independent candidate at filing time because at that point he did not know the identity of his general election opponent from the opposite party. Such reasoning ignores the fact that a primary candidate always knows that he will have an opponent from the opposite party. However, under the lower court's "alternate means" (permitting an independent candidate to file his certificate of candidacy at the same time as primary candidates but not demanding the necessary signatures until the primary elections or thereafter) the primary election victor would not know he was to have in addition an independent opponent until after the primary election and possibly well into his general election campaign, perhaps after a substantial amount of campaign funds had already been spent or committed in different directions.

The lower court also emphasized that an independent candidate would not know who his opponents were until after the primary. However, *as of the filing date,* an independent does not truly know whether he himself will qualify for the general election ballot. In light of the thirty-five day validation process and the possibility of legal challenges to the petitions, he may not be certain of his own status until after the primary election. In the present case, the court's opinion was filed one day before the May 18 primary.

This tunnel vision of the lower court is further evidenced by its sole focus on the respective burdens of primary *contestants* and *potential* independent candidates and its blindness to the situation of primary *victors* and independents who qualify for the general election ballot. Maryland's 70 day pre-primary filing deadline allows 35 days for signature validation and another 35 days for challenges, with the result that *all* general election candidates are known to each other and the voters at approximately the same time. However, under the lower court's rule, primary victors are forced to run "in a vacuum" for at least 35 days (in the present case from May 18 to July 13 plus 35 days) and a successful independent gets a late start in the general election since he does not know his status until at least 35 days after he submits his signatures (here, mid-August).

Moreover, if an independent candidate is to have a chance at success in the general election against a party opponent, it is important that his status as a candidate be determined at the earliest possible moment. For example, Appellee Bradley, in an affidavit attached to his complaint and filed two weeks after being notified of the insufficiency of his petitions, urged the District Court to grant him expeditious relief because "the campaign has received calls from potential contributors who will donate only after Mr. Bradley is officially on the ballot" (A. 24A). Thus, Bradley's own evidence attests to the vital need for independents to qualify at an early date — an interest served by the pre-primary filing deadline.

In short, instead of Maryland's non-discriminatory, workable statutory scheme for adjusting the relative burdens of obtaining general election ballot access, the lower court, out of concern for excessive burdens and

discrimination, has created a system that unjustly discriminates against primary candidates and imposes greater hardships on all candidates.

IV.

EVEN IF MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE IS FOUND TO EXCESSIVELY BURDEN CONSTITUTIONAL RIGHTS AND THUS DISCRIMINATE AGAINST INDEPENDENT CANDIDATES, ANY DEPRIVATION OF BRADLEY'S RIGHTS IS JUSTIFIED BY NUMEROUS COMPELLING OR SUBSTANTIAL INTERESTS.

The basic justification for any nonimation by petition scheme for independent candidates lies in the State's duty "to protect the integrity of its political processes from frivolous or fraudelent candidates". See *Bullock v. Carter*, 405 U.S. 134, 145 (1972) and *Jenness v. Fortson*, *supra* at 442. Maryland's uniform pre-primary filing deadline fosters this interest. If independent candidates were allowed to perfect their filings at a later date than primary candidates, the way would then be open for the perpetration of some of the time-honored election tricks which invariably confuse the voter and distort the process. For example, one party's nominee might await the outcome of the (other party's) primary and then determine that it would be to his advantage to promote the candidacy by petition of a third candidate for the purpose of artificially siphoning off votes which would otherwise go to the other party's nominee. This might be accomplished by promoting an independent candidate with a name or political appeal similar to the opponent. The lower court's alternative means — that the State permit an independent to file his certificate of candidacy at the same time as primary candidates but demand the necessary signatures on or after the primary election — would not resolve this problem. Unscrupulous party candidates could still encourage

the launching of numerous "protective" petition candidates either to confuse their opponents or to preserve their ability to siphon off the votes when the contingency develops. Nor are such schemes in Maryland electoral politics merely the products of a fertile imagination. Siphoning votes via third candidacies is a hard reality and almost a rule of the game. See *Reeves v. Reeves*, 275 Md. 599 (1975), which involved the siphoning off of votes in a primary by a "name's-the-same" candidate.

In addition, the Section 7-1(e) filing deadline promotes voter and candidate knowledge of all general election candidates at approximately the same time and prevents both independent and primary candidates from obtaining an unfair advantage over each other.

Unlike this Court in *American Party of Texas v. White, supra* at 787 n. 18, the lower court failed to include in the seventy day period between the date an independent candidate must file his signatures and the date of the primary necessary time for administrative and court challenges to the signature verification process. Maryland law requires petition signatures to be validated by the local boards within 35 days of their submission. (April 12 in the present case). For petition gathering campaigns for statewide office, results are forwarded to the State Administrative Board of Election Laws which determines the sufficiency of the signatures and notifies the candidate (April 15). Appellee here filed suit on April 30, two weeks following that determination. After expedited consideration by a three-judge panel, it was not until the eve of the May 18 primary that Bradley's likely status as a qualified independent candidate for U.S. Senate was determined. The point of this litany is clear: under the present Maryland scheme all parties to the electoral process

will know the identity of qualified independents at approximately the same time the primary winner is determined. The three-judge panel in *Auerbach v. Mandel, supra*, expressly noted this value when it sustained the Section 7-1(e) filing deadline in 1972:

> ". . . [V]iewed in perspective of its reasons, March 6th in itself is not an unreasonable time when you consider the need and the State's legitimate interest . . . in requiring . . . that all candidates . . . be known at the same time." Jurisdictional Statement, *Auerbach v. Mandel* at 29.

Moreover, the uniform pre-primary filing deadline, examined in this light, prevents either independents or primary candidates from gaining the upper hand. Under Maryland's scheme, both candidates for the general election ballot will have the same campaign period. If an independent candidate is allowed to submit his signatures on the date of the primary (as the lower court held) and wait 35 days for signature verification) plus an uncertain period of time for administrative and legal challenges to become an official candidate, his party opponents in the general election may have made such headway in campaigning and fund-gathering that the prospects of a serious race by the independent will have evaporated.[16] Conversely, under the lower court's dual deadline system, a party candidate who has spent the majority of his campaign funds in a tough primary may receive the shock of his life to learn that halfway through his general election campaign he now has another serious opponent, viz. an independent candidate.[17] And nothing in the lower

[16] Due to his late campaign start, Bradley gathered only 62,750 votes in the November election. He ultimately obtained 68,341 signatures during his petition campaign, of which 53,567 were valid.

[17] Because of the possibility of administrative and legal challenges with respect to signature validation and independ-

court's proffered election scheme, i.e., uniform filing of certificates of candidacies but waiting until the primary to demand the necessary signatures, will cure these problems; this is because no one, be it voter, party-candidate, newsman or contributor, is going to take an independent seriously until he is an official, qualified general election candidate.[18]

In addition to these significant interests served by Maryland's uniform pre-primary filing deadline, Section 7-1(e) helps foster public discussion of issues among *all* candidates when voter interest is at its peak, viz. the primary campaign. Although this Court has recognized that "public discussion [by candidates] is a political duty", *Buckley v. Valeo, supra,* 46 L. Ed. 2d at 707, Appellee Bradley, who had instructed his signature gatherers to avoid discussing issues during the petition gathering campaign, generally declined speaking invitations which flowed in during the primary campaign. Transcript of Proceedings at 78. He declined to take advantage of these offers of public attention which could have advanced his cause in the general election and which could have afforded him the unique opportunity of attacking without retort his likely general election opponents who were preoccupied with their primary battle. Most importantly, he declined to shed any light for the primary voters (who are also the general election voters) on the issues debated during the campaign. This opportunity and obligation stemmed from Maryland's uniform filing deadline, which stimulated interest in Bradley as a candidate.

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ent ballot access, election officials may face greater administrative difficulties with a later filing deadline for independents.

[18] See Appellee Bradley's testimony that contributors were holding back on committing campaign funds to him until he was a qualified candidate (A. 24A).

Finally, Maryland's uniform pre-primary filing deadline promotes all of these interests while still preserving the right of State voters to be heard at an early point in a Presidential election year with respect to their choice for Presidential nominees. As indicated earlier, a Presidential election year places greater burdens on all Maryland candidates than off-year elections. Not only is the filing date earlier, but all candidates must campaign for a longer period of time. And voters are faced with a greater prospect of confusion as elections, both national and local, become a year-long preoccupation. But the State quite understandably has determined that a May primary is important in Presidential election years in order to give Maryland voters a role in selecting the Presidential candidates and to increase voter participation in the State electoral process. The lower court's decision demands that the State either forego this role for its voters or abandon the legitimate interests asserted in behalf of the Section 7-1(e) filing deadline.

In short, the State contends that whether viewed separately or in conjunction, these interests are more than sufficient to support whatever burdens or discrimination may be said to arise from Maryland's uniform filing deadline.

V.

HICKS v. MIRANDA DID NOT RELIEVE THE DISTRICT COURT OF ITS OBLIGATION TO DISTINGUISH AND HARMONIZE PRIOR SUMMARY AFFIRMANCES AND WRITTEN DECISIONS OF THIS COURT UPHOLDING THE CONSTITUTIONALITY OF STATUTES SUCH AS SECTION 7-1(e) NOR DID IT SUGGEST THAT SUMMARY AFFIRMANCES REPRESENT AN ADOPTION OF THE PRECISE REASONING OF THE LOWER COURT.

A fundamental issue in this case is whether the lower court guessed correctly when it held that the summary affirmance in *Salera v. Tucker, supra,* in effect

overruled the five summary affirmances and two written decisions of this Court which support the constitutionality of Maryland's uniform filing deadline for candidates. On two occasions the court below opined on the effect to be given particular summary affirmances of this Court. The three-judge panel noted that the issue of the constitutionality of the Section 7-1(e) filing deadline had been raised in this Court in *Auerbach* but said "we do not believe that the Supreme Court decided it". (AJS. p. 11a). Yet, despite the fact that the issue as framed for this Court in *Salera* wove together the constitutionality of both the signature gathering period and filing deadline for independent candidates in Pennsylvania,[19] the lower court here said "we are confident that *Salera* did decide the issue before us", (AJS. p. 8a) *viz.*, the validity *vel non* only of a pre-primary filing deadline. Absent in the court's opinion was any attempt to employ the methodology of *Storer* and *Jenness* or any serious attempt to distinguish the substantial amount of authority in support of the constitutionality of Section 7-1(e). In effect, the lower court declared that the summary affirmance in *Salera* had overruled the following written and summary decisions of this Court: *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972) (upholding

[19] According to Pennsylvania's Jurisdictional Statement in *Salera*, the relevant question was framed: "Whether the United States District Court for the Easten District of Pennsylvania, sitting as a three-judge court pursuant to 23 U.S.C. §2284, committed error in ruling that, under the Pennsylvania Election Code, the requirement that candidates of political bodies collect signatures for their nomination papers between the tenth and seventh Wednesdays prior to the primary election *and* file such nomination papers no later than the seventh Wednesday prior to the primary election, violated a constitutional right secured by the United States Constitution." (Emphasis added).

a filing deadline of 90 days before the primary and 9 months before the general election); *Pratt v. Begley*, 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1972) (upholding a filing deadline of 55 days before the primary and 7 months before the general election); *Jenness v. Fortson*, 403 U.S. 431 (1970) (upholding a filing deadline of 69 days before the primary and 5 months before the general election even though this provision was coupled with a 180-day signature-gathering period and a 5% signature requirement); and *Williams v. Rhodes*, 393 U.S. 23 (1968) (where the filing deadline later sustained in *Sweetenham* was struck down *but only* in conjunction with restrictive provisions of Ohio law which made it virtually impossible for a nonparty candidate to obtain ballot access).[20] Apparently of little concern to the panel below during this devastation of this Court's ballot access cases was the fact that less than two months before the *Salera* affirmance *Jenness* was relied upon by this Court to sustain the constitutionality of certain provisions of the Federal Election Campaign Act in *Buckley v. Valeo*, *supra*, at 733-36, or that the *Auerbach* and *Wood* cases were cited favorably in *Storer*, *supra*, at 739, n. 10 when this Court last gave plenary consideration to a ballot access case.

The lower court cited *Hicks v. Miranda*, 422 U.S. 332 (1975), as authority for its out-of-hand dismissal of the precedential value of the above decisions. However, it is not even clear that *Hicks* would apply in this case. In *Hicks* this Court said that a lower federal court erred in disregarding a prior state court case appealed to the

[20] In addition, the lower court laid waste to *Auerbach*, *Maryland People's Party* and *Wood v. Putterman*, the three cases between 1970 and 1973 in which this Court gave summary, favorable consideration to the constitutionality of Maryland's nomination by petition process (which has not since changed).

Supreme Court and dismissed "for want of a substantial federal question". The present case, however, involves a summary affirmance, not dismissal for want of a substantial federal question, and this Court on a number of occasions has stated that the former are less weighty decisions. In *Gibson v. Berryhill*, 411 U.S. 564, 576 (1973), this Court conceded that summary affirmances are "somewhat opaque". And in *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975), Chief Justice Burger in his concurring opinion stated:

> "When we summarily affirm without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

Cf. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

In addition to applying to summary dismissals rather than summary affirmances, *Hicks* required a federal court considering a constitutional challenge to a statute to accord precedential effect to a summary disposition relative to the *exact same statute*. Thus if the lower court in *Bradley* was going to follow in its entirety its mistaken view of *Hicks*, it would have been obligated to feel itself bound by *Auerbach* which involved the constitutionality of Section 7-1(e) rather than *Salera* which dealt with a different Pennsylvania law.

However, even assuming *Hicks* applies fully to summary affirmances, it still would mean only that a summary affirmance by the Supreme Court is a decision on the merits in a case and that lower courts are not free to disregard such decisions. It does not elevate the lower court opinion to equal footing with the words of this Court, nor does *Hicks v. Miranda* prescribe the weight to be given the lower court's

reasoning in light of a summary affirmance that follows hard on the heels of a line of written and summary decisions which suggest or mandate a result contrary to that reasoning but consistent with the result in the case.[21] In light of the seriousness with which this Court regards the prospect of overruling a prior decision, lower courts should have a similarly weighty obligation to reconcile a single summary affirmance with other Supreme Court decisions of recent vintage by employing the methodology set out in this Court's written decisions. Even in *Hicks*, this Court indicated that lower courts should "ascertain the reach and content of summary actions." 422 U.S. at 345 n. 14.

One thoughtful commentator on *Hicks v. Miranda* has said that pursuant to this duty, lower courts must

> ". . . analyze carefully the grounds upon which the statute was upheld in the prior appeal, including, for example, the precise wording of the statute, the constitutional provisions relied upon, the party who asserted the claim in the prior appeal and most importantly, the precise facts upon which the statute was upheld". Note: The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks v. Miranda*, 76 Columbia L. R. 508, 529 (1976).

In disregard of these principles, the lower court here avoided numerous opportunities to distinguish *Salera* from the present case. First and foremost was the requirement of the Pennsylvania statute that signatures be gathered within 21 days. The three-judge court for the District of Maryland, like the lower court in *Salera*, was all too quick to proclaim such a feature as *per se* unburdensome under all circumstances, a course

[21] As noted earlier, we have no quarrel whatever with the *result* of striking down a three-week signature-gathering period which ends as early as was the case in *Salera*.

which this Court eschewed in *Storer*, 415 U.S. at 740. In *Storer* this Court deemed a 24-day period to gather signatures for an independent Presidential candidate as "a substantial requirement" and remanded the case for a determination of whether this provision coupled with other restrictive features of California law placed too great a burden on independent candidates. As a practical matter, the absence of such a substantial restriction from Maryland's nomination by petition law renders the scheme challenged by Bradley infinitely less burdensome than the Pennsylvania statute. Moreover, even the lower court's opinion contained repeated references to the unconstitutional remoteness from the general election of the "signature gathering period". 399 F. Supp. at 1266-67. *Salera* is also distinguishable in a number of other important respects. It involved a 218-day period before the general election in a non-Presidential election year. In such cases, Maryland requires only a 120-day period. Moreover, the element of the Presidential preference primary present in this case necessarily strengthens the legitimate state interests so summarily rejected in *Salera*. This case also involves substantial interests not presented or discussed in *Salera*, but considered substantial by this Court in prior cases. In addition, *Salera* is distinguishable on the basis of facts the three-judge court in Pennsylvania thought important, *viz.*, the status of the parties. In *Salera* the statute was challenged by a class who expressed its intention to vote for the candidate, 399 F. Supp. at 1262 N. 4. In the present case the only intent averred by Bradley's supporters is their desire to see his name on the general election ballot. The *Salera* court even determined that the bad weather petition circulators must face when gathering signatures at an early date was important in gauging burdensomeness. 399 F. Supp. at 1266. Evi-

dence before the Bradley court here indicated that in 1976-76 Maryland had one of its mildest winters in history.[22]

In short, if the lower court wanted to avoid its draconian reversal of this Court's ballot access cases, it could have readily and reasonably distinguished *Salera* on a number of bases. Moreover, it could have and should have relied on the principles of written decisions of the Supreme Court to resolve the result reached in *Salera* with a conclusion that Section 7-1(e) is not violative of Bradley's constitutional rights.

[22] Unlike the situation in *Salera*, the Maryland statute was challenged by an independent candidate who demonstrated that he was able to acquire a sufficient number of signatures by the filing deadline, but was kept off the ballot because the inefficiency of his campaign resulted in thousands of invalidated signatures.

CONCLUSION

In summary, Appellants urge that the District Court has abdicated its duty to reconcile *Salera* with other decisions of this Court, to employ the methodology set out in *Storer* and *Jenness*, and to gauge the impact of Maryland's candidate filing date in light of other features of the State's election law and the realities of independent ballot access in Maryland. For these reasons, the State contends that the lower court abused its discretion in enjoining State election officials from refusing to accept additional signatures submitted by Appellees after the statutory deadline, and the Appellants were entitled to judgment as a matter of law. Accordingly, the decision of the District Court must be reversed and judgment entered for Appellants.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, Governor of Maryland, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL., *Appellees*

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, Governor of Maryland, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Maryland

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BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether Maryland Code (1976 Replacement Volume), Article 33, Sec. 7-1(e) [1] deprives the appellee

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[1] On March 16, 1976, § 7-1(e), was amended. The deadline for filing of certificates of candidacy and petitions now appears at § 7-1(i). The substance of the provision was not changed, however, and pursuant to § 7-1(i), the filing deadline for petitions in 1976 would have been March 8, 1976, the same as under former § 7-1(e). The Appellants, on Brief, failed to note this change and referred throughout their Brief to the statutory provision in question as § 7-1(e). For the convenience of the Court and to avoid confusion, the appellees in this Brief will refer to the challenged section as § 7-1(e). However, appellees desire to make clear that the filing deadlines which are the subject of this litigation now appear at § 7-1(i) of Article 33, not § 7-1(e).

candidate and voters of rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution in that this statute required independent candidates for statewide office to file petitions containing the signatures of 51,155 registered voters of Maryland with the county election boards on March 8, 1976, which date is 70 days prior to the primary election in Maryland and which is 239 days prior to the general election, in order for the independent candidate's name to appear on the ballot in the general election to be held in November, 1976.

STATEMENT OF THE CASE

This case involves the difficulties encountered by independent candidates in the State of Maryland who seek to have their names placed on the general election ballot by satisfying the requirements of the nomination by petition process, as provided in the Maryland Election Code.

Bruce Bradley, one of the plaintiffs in the District Court, is a voter in the State of Maryland and is registered as an independent. In the Spring of 1975, Mr. Bradley decided to run as an independent candidate for the United States Senate seat which was then held by Honorable J. Glenn Beall. (Tr. 64).[2]

In order for the name of an independent candidate to appear on the general election ballot, the independent candidate must comply with the requirements of the nomination by petition process. The independent candidate does not take part in the primary election

[2] References to the Appendix to the Jurisdictional Statement will be cited as "AJS." References to the Appendix which accompanied Appellants' Brief will be cited as "A." References to the Transcript of the Hearing of May 12, 1976 will be cited as "Tr."

process. The burdens imposed by the nomination by petition process are found at Section 7-1 of the Maryland Election Code.[3] The net effect of this provision was that in 1976, an independent candidate for statewide office was required to file no later than March 8, 1976[4] his or her certificate of candidacy to which had been appended the signatures of 51,155 registered voters of the State of Maryland. If the independent candidate succeeded in performing this task, that candidate's name would appear on the ballot in November, 1976. If the independent candidate did not carry this burden, the name would not appear on the November ballot.

A partisan candidate who sought nomination by means of the primary election process for the 1976 election must also have filed a certificate of candidacy on March 8, 1976. However, the partisan candidate was not required to append any signatures to his certificate of candidacy. The mere filing of the partisan candidate's certificate of candidacy guaranteed the partisan candidate a place on the primary election ballot. §§ 4A-1, 4A-3.

[3] Maryland Code (1976 Repl. Vol., 1976 Cum. Supp.) Art. 33, § 7-1. AJS. 19a-22a. Unless otherwise noted, all references to statutory sections of the Maryland Code are references to Article 33, the Maryland Election Code.

[4] This date is provided by statute and is required to be seventy (70) days prior to the day on which the primary election is held. § 7-1(e). The date of the primary election in Maryland in 1976 was May 18, 1976. The date for the primary election is set by statute as the third Tuesday in May in presidential election years. § 5-2. In all other years, the primary election date is the second Tuesday after the first Monday in September. *Id.* Thus, in non-presidential election years, the dates for filing of certificates of candidacy fall in July.

As an independent candidate, Mr. Bradley commenced in the Spring and Summer of 1975 to organize his campaign and signature gathering drive. (A. 16A, 20A). The signature gathering drive was hampered substantially by the difficulties of maintaining a politically oriented activity in the Fall and Winter of 1975-76, a time far in advance of the high public interest in national and statewide politics. The problems included difficulties maintaining a campaign staff (A. 20A), difficulties in developing coverage of the campaign by the printed and electronic media (A. 21A) and difficulties in arranging personal appearances for candidate Bradley (A. 27A-30A).

Despite these difficulties, Mr. Bradley tendered his certificate of candidacy to the State Administrative Board of Election Laws on March 8, 1976 with 53,239 signatures appended to the certificate. However, subsequent to the signature verification process, the State Administrative Board of Election Laws notified Mr. Bradley that only 42,049 "valid" signatures [5] had been appended to the certificate.

Since that number fell short of the 51,155 necessary for nomination, the Administrator of Election Laws stated on April 15, 1976 that Mr. Bradley's name would not appear on the ballot in the November general election.

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[5] § 7-1 specifies requirements which must be satisfied in order for a signature to be deemed "valid" for the petition process. These requirements include, *inter alia*, that the registered voter print his name beneath his signature, that a resident must sign only that petition sheet bearing the name of that voter's county of residence and that each petition sheet be notarized by a notary public who knows the signator to be a registered voter of the designated county.

Mr. Bradley commenced negotiations with various representatives of the State in order to reach an accommodation concerning Mr. Bradley's candidacy and place on the ballot. Since such an accommodation could not be reached, Mr. Bradley and other registered voters of the State of Maryland instituted suit in the Federal District Court for the District of Maryland on April 30, 1976. Plaintiffs below claimed, *inter alia*, that the remote March 8 deadline for the filing of the certificate of candidacy and the required 51,155 signatures, falling 70 days before the primary election and 239 days before the general election, placed an unreasonably heavy burden on Bradley to have his name placed on the ballot and thus violated the Plaintiffs' First and Fourteenth Amendment rights. (A. 3A-14A).

On April 30, the day suit was filed, an Order was entered with the consent of all parties which permitted Bradley to collect additional signatures and to file the same with the Defendants until May 18, 1976. However, the Order did not require the Defendants to take any action with respect to the signatures until further Order of the Court. (A. 14A-15A).

A three judge court was duly convened on May 12, 1976 and the matter came on for hearing on the motion for preliminary injunction. At the hearing, evidence was received from all parties.

Plaintiffs submitted affidavit testimony, subject to cross-examination, which established the burdensome nature of the early filing deadline.

Plaintiff John F. Falconer was campaign manager for the Bradley campaign. Mr. Falconer testified that his primary initial duty in the campaign was to orga-

nize and operate a successful signature gathering drive. (A. 20A). In this regard, Mr. Falconer testified that it was difficult to recruit volunteers for the campaign since few persons could feel the immediacy of collecting signatures in the Fall and Winter of 1975 for an election to be held in November, 1976. (A. 20A). During the petition gathering period, the campaign recruited and lost three petition drive chairpersons, two schedulers and five county chairpersons. The common denominators for the loss of these persons were, first, the frustrations of expending a large effort in a political campaign during a time period remote from the actual election, and, second, the pressures resulting from conducting a petition drive in adverse winter weather conditions. The lack of media attention during the signature drive further demoralized the campaign staff (A. 20A-21A). The campaign made numerous efforts to attract coverage from both the printed and electronic media. The normal response to these requests was that the Bradley campaign would be covered along with the primary election campaign—a time which occurred after the filing deadline for petitions. In Mr. Falconer's estimation, the lack of media coverage severely hampered the campaign in three ways: 1) damage to fundraising efforts; 2) demoralization of campaign staff; and 3) lack of voter knowledge of Mr. Bradley and his campaign. (A. 21A). With regard to fundraising, it should be noted that at the time suit was filed, the 45 day period *following* the March 8 filing deadline had been the most productive period for fundraising purposes. (A. 22A).

The essence of Mr. Falconer's testimony was that the early filing deadline was damaging to the campaign

organization, nearly eliminated the amount of media coverage the campaign would have received if it were conducted later in the year, and diminished the campaign contributions which were needed to conduct a forceful, full-scale petition drive.

Susan Madison was one of the schedulers for the Bradley campaign. She filed an affidavit in support of the motion for temporary restraining order and preliminary injunction (A. 27A-30A) and was a witness at the hearing below. Ms. Madison testified that her duties included arranging for Mr. Bradley's public appearances. She testified that extreme problems were encountered in scheduling the candidate for public appearances before civic and other groups in the Winter of 1975-76. Ms. Madison indicated that she explained the petition process to her target groups and that she pointed out the time frame in which an independent candidate must operate in Maryland. Despite the fact that the time during which Mr. Bradley needed extensive exposure to the public was the period preceding the March 8 filing deadline, the vast majority of groups contacted indicated that they would allow Mr. Bradley to speak to the group only during their previously scheduled political meetings and "candidates' nights" to be held during the months of March, April and May, 1976. Accordingly, Mr. Bradley would be allowed to appear before these groups only after the filing deadline for nominating petitions had passed. Typical of the groups contacted by Ms. Madison were women's clubs, community centers, chapters of the League of Women Voters, senior citizens groups, chambers of commerce and student associations. Ms. Madison further testified that after the March 8 deadline, as the primary election campaigns

were increasing in tempo, many groups requested that Mr. Bradley make appearances before them. These appearances of course would in no way aid the theretofore completed petition drive.

Plaintiff Bradley filed an affidavit below (A. 15A-19A) and was a witness at the hearing. Mr. Bradley stated that the petition drive which must be concluded 239 days before the general election imposed severe hardship on prospective Independent candidates. Mr. Bradley testified that the Fall of 1975 was a crucial period for the independent candidate's petition drive since during that time, the petition drive organization must have been established and the petition drive itself must have been forcefully commenced. However, in the Fall of 1975, none of the four major daily newspapers in Maryland had even assigned correspondents to cover the United States Senate race in Maryland. No journalistic machinery was in place to cover the development of the Bradley campaign or petition drive. The candidate and his platform remained relatively unknown prior to the March 8, 1976 deadline. Bradley further testified that the March 8, 1976 filing deadline imposed on the campaign an onerous time period for an independent to commence active campaign work since it required that finances be raised and a campaign organization developed in excess of one and one-half years prior to the general election.

The State presented two witnesses at the May 12, 1976 hearing. Professor Richard Smolka testified concerning the content of Maryland's election laws and his opinions concerning the burdens experienced by an independent candidate in Maryland. (A. 32A-36A). That testimony is summarized in Appellants' Brief

at 7-9.[6] However, it should be noted that on *voir dire*, Professor Smolka admitted that he had never performed quantitative research on the relative ease of gathering petitions at various stages prior to a primary or general election and that he personally had never collected any petitions. (A. 58A-59A.)

The State also presented as a witness Willard A. Morris, State Administrator of Election Laws. He testified concerning the history of Maryland's independent candidate procedure, the events relating to the Bradley campaign's nomination by petition effort and the ability of independent candidates to gain a place on the ballot by means of the nomination by petition process. (A. 36A-49A). Mr. Morris stated that independent candidates had successfully gained ballot placement in non-presidential election years, *i.e.*, when the filing deadline is in July, and that independent candidates had achieved ballot placement for offices of less than statewide authority in presidential election years. However, on cross-examination, Mr. Morris admitted that no candidate for statewide office had ever gained ballot placement using the nomination by petition process in a presidential election year when the filing deadline for nominating petitions falls in early March for a general election to be held in November. (A. 63A.)

Mr. Morris further admitted that one other candidate for statewide office failed to append a sufficient number of signatures to petitions required to be filed on March 8, 1976 to guarantee a ballot position in November. That candidate was former Senator Eugene McCarthy.

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[6] References to Appellants' Brief filed with this Court will be cited as "Br."

At the close of the May 12, 1976 hearing, the case was taken under submission.

On May 17, 1976, the Opinion of the District Court issued. (AJS. 1a-13a). The decision will be discussed below at length. It is sufficient here to note that: (1) the District Court concluded that the March 8, 1976 termination date substantially burdened the ability of Mr. Bradley to gain access to the ballot (AJS. 6a); (2) no compelling state interest justified that burden (AJS. 6a-9a); (3) that the instant case was indistinguishable from a three judge district court case, *Salera* v. *Tucker*[7] and that the *Bradley* District Court was bound by the Supreme Court's summary affirmance of *Salera* v. *Tucker*.

On June 2, 1976, the Order of the District Court issued which declared that § 7-1(e) denied the constitutional rights of Mr. Bradley to gain a place on the ballot and denied the constitutional rights of the other plaintiffs to vote for Mr. Bradley as the candidate of their choice. The District Court afforded Mr. Bradley additional time until July 13, 1976 to seek additional signatures and ordered that the name of Bruce Bradley be placed on the ballot for the general election to be held in November, 1976 if by July 13, 1976, Mr. Bradley collected additional valid signatures to cause his total to exceed 51,155 signatures.

Mr. Bradley collected the needed additional signatures and, by letter of July 30, 1976, the State Administrative Board of Election Laws notified Mr. Bradley that his name would appear on the ballot as an independent candidate for the United States Senate.

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[7] 399 F.Supp. 1258 (E.D. Pa. 1975) *aff'd.* 424 U.S. 959 (1976).

The name of Bruce Bradley did appear on the ballot in the November general election. Mr. Bradley was defeated in that election.

SUMMARY OF ARGUMENT

I.

Section 7-1(e) of the Maryland Election Code violates the First and Fourteenth Amendment rights of independent candidates and their voter-supporters in the State of Maryland. Based upon the evidence presented, the District Court properly determined that the early filing requirements placed a substantial burden on the ability of independent candidates to gain access to the ballot. That burden is demonstrated both by the experience of the Bradley Campaign and by the history of independent candidacies in Maryland. The District Court properly considered and rejected as insufficient the purported compelling state interests proffered by the State in support of the early filing date. Burdens on the full exercise of constitutional rights must fall unless those burdens are justified by a compelling state interest and unless those burdens are the least restrictive burdens necessary to protect that compelling state interest. *See e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973). The failure of the State to establish a compelling state interest justifying the early filing deadline required the District Court to declare Section 7-1(e) unconstitutional.

II.

In its decision, the District Court properly applied the principles enumerated by this Court in *Hicks* v. *Miranda,* 422 U.S. 332 (1975). The *Bradley* District

Court was presented with a district court decision which considered facts and legal issues similar to those presented in *Bradley* and which had been summarily affirmed by this Court. *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975) *aff'd,* 424 U.S. 959 (1976). The *Bradley* District Court scrutinized *Salera* to determine if *Salera* was factually distinguishable. Only after full scrutiny of *Salera* and on investigation of the issues presented to this Court through *Salera's* opinion and jurisdictional statement did the *Bradley* District Court deem itself bound by *Salera* thus requiring *Salera's* application to the Bradley litigation.

Consequently, combined with its independent determination that the Maryland Code imposed constitutionally impermissible burdens upon independent candidates, the District Court's application of *Salera* through *Hicks* further serves to establish the correctness of its decision.

ARGUMENT

I. SECTION 7-1(e) OF THE MARYLAND ELECTION CODE VIOLATES THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF INDEPENDENT CANDIDATES AND THEIR VOTER-SUPPORTERS.

A. Applicable Principles.

Section 7-1(e) in the 1976 presidential election year required that independent candidates for statewide office file on March 8, 1976, certificates of candidacy to which had been appended the signatures of 51,155 registered voters of the State of Maryland. If the independent candidate succeeded in fulfilling this obligation, that independent candidate's name would appear on the ballot for the general election held in November, 1976. If the independent failed to file a certificate with

the required number of signatures appended, the independent candidate's name would not appear on the general election ballot.

Candidates who sought nomination for office as members of an organized political party must also have filed certificates of candidacy on or before March 8, 1976, in order for their names to appear on the primary election ballot. However, these candidates need not have appended any signatures to their certificates. The mere filing of a certificate of candidacy guaranteed that the partisan candidate's name would appear on the primary election ballot. *See* §§ 4A-1, 4A-3.

The statutory scheme suggests two areas of constitutional infirmity in the election process as it relates to independent candidates. First, the statutory scheme may be burdensome on the First Amendment rights of independent candidates in light of the substantial difficulties which face independents in qualifying for a ballot position. The right to vote for the candidate of one's choice derives from the right of association which is protected from state infringement by the First Amendment as applied to the States through the Fourteenth Amendment. *See, Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968); *NAACP* v. *Button,* 371 U.S. 415, 430 (1963). Second, the statutory scheme is questionable under the Fourteenth Amendment's equal protection tenets. The statutory scheme creates two classes, independent candidates and candidates from established political parties. The right considered is access to the ballot. The burdens placed upon independent candidates in achieving a ballot position in the general election differ from those of candidates from established parties.

The burdens imposed upon independent candidates are to be subjected to "exacting scrutiny" and can be sustained only if they further a vital or compelling governmental interest. *See Buckley* v. *Valeo,* 424 U.S. 1, 58-59, 93-94 (1976); *Storer* v. *Brown,* 415 U.S. 724, 729-731 (1974); *American Party of Texas* v. *White,* 415 U.S. 767, 780-81 (1974).

Further, even if a compelling or vital state interest is identified by the State, the means used by the State to protect that interest must be carefully circumscribed so as not to unnecessarily restrict a constitutionally protected liberty. *See, e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673, 2684-85 (1976); *Buckley* v. *Valeo, supra; United States* v. *Robel,* 389 U.S. 258, 267 (1967).

Plaintiffs submit that the District Court below properly utilized this traditional analysis of constitutional issues. It made an independent judgment on the facts presented that the early March 8 filing deadline substantially burdened Mr. Bradley's ability to gain access to the ballot. The District Court fully examined and properly rejected the purported compelling or vital state interests proffered by the State. Finally, even assuming *arguendo* that the State had established a compelling or vital interest in the independent candidate scheme which required protection, the State has totally failed to fulfill its affirmative obligation of establishing that the means chosen to protect that interest imposed the least possible restrictions on the exercise of constitutional rights.

B. The Early Filing Deadline for Independent Candidates' Petitions Places a Substantial Burden on the Ability of Independent Candidates to Gain Access to the Ballot.

Both the evidence presented before the District Court and an analysis of the history of independent candidacies in Maryland indicate that the early March filing deadline for independent candidates' certificates and supporting signatures severely impairs the ability of independent candidates to gain access to the ballot.

The evidence presented by the Plaintiffs to the District Court on the issue of the burdensome nature of the early filing deadline was primarily sponsored by three witnesses, the candidate, Bruce Bradley; the Bradley For Senate campaign manager, John Falconer; and the scheduler for Mr. Bradley, Susan Madison.

Their testimony established that the early filing deadline adversely affected the ability of the candidate to gain a position on the ballot in five primary ways during the conduct of the petition drive:

1. There was an absence of coverage by the printed and electronic media which caused the candidate, his platform and his petition drive to remain relatively unnoticed.
2. Extreme difficulties were experienced in scheduling the candidate for public appearances.
3. The petition drive organization was forced to operate in adverse weather conditions in a time frame out of synchronization with high public interest in political matters.
4. Campaign contributions were difficult to garner in this remote time frame.
5. Difficulties arose in maintaining cohesion in the campaign organization.

The testimony of Mr. Bradley (A. 17A) and Mr. Falconer (A. 21A) both referred to the absence of media coverage of the campaign, the cause of that absence, and the effect of the lack of media coverage on the campaign and petition drive.

Mr. Falconer indicated that the campaign had exerted strenuous efforts to entice media coverage of the petition drive. Hundreds of telephone calls were made to various representatives of the media in an effort to gain exposure for the campaign during the petition drive. (A. 21A). However, the normal response to those inquiries was that the Bradley campaign would be covered during the primary election campaign. Of course, the primary campaign occurs *after* the filing date for petitions; thus any media coverage at that point would in no way aid the petition drive. All four major daily newspapers serving the State of Maryland were contacted concerning their coverage of the Bradley petition drive; however, in the fall of 1975, none of these publications had even assigned a correspondent to cover the United States Senate race (A. 17A). There was an absence of adequate journalistic machinery to cover the Bradley petition drive and campaign due to the time frame in which the petition drive was forced to operate. Because of this lack of media coverage, prospective petition signers were unaware of the Bradley campaign, the Bradley platform and, most importantly, were unaware of the petition drive itself.

On brief, the State belittles the arguments of the Plaintiffs that the lack of media coverage severely impacted the campaign. (Br. 26). However, Plaintiffs respectfully submit that to deny the vital importance

of media coverage of a major political action in the twentieth century is to deny reality.

Had the petition drive been conducted in a later time frame coinciding with media interest in Maryland or national politics, *i.e.*, in the Spring or Summer of 1976, the signature gathering effort would have been substantially less burdensome.

Susan Madison, the scheduler for Mr. Bradley's public appearances, testified concerning the difficulties experienced by the campaign in arranging for public appearances for the candidate during the signature gathering effort. (A. 27A-30A). Ms. Madison testified that she expended substantial efforts in attempting to arrange for public appearances for the candidate. These public appearances were important in several aspects. First, the candidate and his platform could have gained valuable exposure. Second, the petition drive effort could have been explained to the group with the result that some of the persons in attendance would have signed the petition. Third, exposure through public appearances would have resulted in an increase in the number of volunteer staff workers for the campaign and petition drive effort.

As a direct result of the early filing deadline, these benefits did not accrue to the Bradley campaign effort. Ms. Madison contacted numerous groups, including but not limited to chapters of the League of Women Voters, student groups, senior citizens groups, chambers of commerce and institutions of higher learning. The normal response of these groups was that they would be pleased to allow Mr. Bradley to speak to the group, but not before the months of March, April and May, 1976. Mr. Bradley's appearance would take

place on a "candidates' night" or at a political forum where all senatorial candidates could speak. The time frame for the political gatherings was during the primary election campaign. Thus, Mr. Bradley could gain broad exposure to these influential groups only *after* his petition drive had been completed. The resources of these groups were as a practical matter denied to Mr. Bradley in his petition drive effort by the early filing deadline imposed by Maryland on independent candidates.

Since the petition drive was terminated by the filing of petitions on March 8, 1976, the major effort of the petition drive must occur during the Fall and Winter of 1975-76. It strains the obvious to state that gathering petitions is not a pleasant task. This unpleasantness is multiplied when the major petitioning effort takes place in adverse weather conditions. As Campaign Manager Falconer pointed out in his testimony, during the winter months the number of persons in public places is minimal. Further, it is a burden on the potential signator to stop, listen to the petitioner, and sign the petition. (A. 22A). The major efforts for the collection of signatures for the Bradley campaign was thus required to take place in a time frame remote from the primary or general election, when political awareness was low and during adverse weather conditions. (A. 22A). Had the petition drive occurred late in the year during the Spring or Summer of 1976, voter interest in the senatorial campaign would be high, more voters would be available to the petitioners in public places and the physical task of petitioning would have been less onerous with the obvious result

that more volunteer petitioners would have been available for longer periods of time.[8]

Testimony was also received that the remote time frame impacted adversely upon campaign contributions. Mr. Falconer testified that the campaign experienced severe difficulties in meeting the current expenses of the petition drive. Mr. Falconer stated that at least in part, the inability of the campaign to raise sufficient money to fund the petition drive came as a result of: (1) the time frame of the petition drive which was remote from the primary and general elections; (2) the absence of media coverage of the petition which, as discussed earlier, is caused by the remote time frame; (3) absence of political awareness of the electorate in this remote time frame. (A. 21A). Evidence of the impact on contributions of increased media coverage and political awareness is seen in the increase in contributions received by the Bradley campaign as the elections grew closer. (A. 22A). At the time suit was filed, the forty-five day period *following* the March 8 filing deadline had been the most productive fundraising period for the campaign. (A. 22A).

Finally, the remote filing deadline adversely affected the campaign organization itself. During the petition gathering period, the Bradley campaign recruited and lost three petition chairpersons, two schedulers and five county chairpersons. Campaign Manager Falconer testified that the common denominator for the loss of these persons was the demoralization of the campaign staff. This demoralization resulted from the

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[8] It is of interest to note here that the Bradley campaign was forced to employ people to gather signatures due to insufficient volunteer petitioning support in the winter months. (A. 22A).

pressures of coordinating the petition drive during the winter when weather conditions were bad and voter interest was low, and from the frustration of expending great efforts during a time period when the media devoted no time to the senatorial race, much less to the Bradley campaign. (A. 20A).

Without question the problems set forth above would have been eliminated or substantially ameliorated if the petition drive could have been conducted during a period contemporaneous with the primary and general election activities.

Equally important, the actual experience of other independent candidates in seeking ballot access through the nomination by petition process is a fact which must be considered in determining whether the statutory scheme substantially burdens the constitutional rights of independent candidates. *Storer* v. *Brown*, 415 U.S. 724, 742 (1974). An analysis of that experience indicates that the early March filing deadline constitutes a substantial burden on Maryland independent candidates.

Willard A. Morris is the State Administrator of Election Laws. He was a witness for the State before the District Court below. In his Statement to the District Court (A. 36A-49A), Mr. Morris, *inter alia*, discussed the experience of independent candidates in Maryland. He appended to his Statement a list of all independent candidates who have qualified for a place on the Maryland general election ballot during the past ten years. (A. 43A-49A). The following discussion is an interpretation of Mr. Morris' Statement, attachment and testimony.

Because of a statutory revision in 1969 and 1970, the presidential election year of 1968 was the last presidential election year in which independent candidates could file nominating petitions in the summer of the election year. In 1968 those petitions were due on July 27, 1968. (A. 41A). In 1972 and 1976, the filing deadline for independents fell in March. In non-presidential election years, *i.e.*, 1970 and 1974, the date for filing of nominating petitions fell in July.

An analysis of Mr. Morris' Statement and attached list indicates the following:

1. In 1968, with a July deadline, three independent candidates qualified for statewide office. (A. 45A).
2. In 1970, with a July deadline after imposition of the new statutory scheme, no independent candidates qualified.
3. In 1972, with a March deadline, after imposition of the new statutory scheme, no independent candidates qualified.
4. In 1974, with a July deadline, after imposition of the new statutory scheme, eight candidates qualified, though none qualified for statewide office. (A. 43A-44A).

In 1976, with a March deadline, no candidate for statewide office[9] qualified for a ballot position. In addition to Mr. Bradley's attempt, former Senator

[9] Two candidates did qualify for ballot position for offices of less than statewide authority in 1976. One of those candidates needed 3,864 signatures to qualify. The other needed 8,361 signatures. (A. 61A). Independents for statewide office needed 51,155 signatures to qualify.

Eugene McCarthy attempted and failed in Maryland in 1976 to gain a ballot position for a statewide office.

It is thus apparent that no independent candidate for statewide office has ever qualified for a ballot position when the filing deadline fell in March.

On the above summarized testimony which was presented to the District Court subject to cross-examination, the District Court found that "the March 8 termination date of the signature gathering period in the 1976 general election in Maryland substantially burdened the ability of Bradley to gain access to the ballot . . ." (AJS. 6a). The Supreme Court has not recently spoken in a definitive full opinion on the constitutionality of various deadlines for the filing of nominating petitions by independent candidates. However, some opinions of the Court have indicated that early filing deadlines impose a substantial burden on the exercise of constitutional rights and thus are constitutionally suspect.

The first indication is found in the interplay of the Court's opinions in *Williams* v. *Rhodes*[10] and *Jenness* v. *Fortson*.[11] In *Jenness*, a statutory scheme of the State of Georgia which regulated independent candidacies was considered by this Court. In Georgia, candidates who did not enter and win a political party's primary election were required to file nominating petitions on the second Wednesday in June preceding the November general election. 403 U.S. at 432. This Court upheld as constitutional that June filing deadline. However, in the discussion of the Georgia statutory scheme, this Court compared the filing deadline

[10] 393 U.S. 23 (1968).

[11] 403 U.S. 431 (1971).

burdens of the Georgia statute in *Jenness* with those of the Ohio statute in *Williams*, stating that, "Unlike Ohio, Georgia does not fix an *unreasonably early filing deadline* for candidates not endorsed by established parties." 403 U.S. at 438 (emphasis added). An examination of *Williams* shows that the filing deadline in Ohio—which had been referred to as "unreasonably early" by this Court—fell on February 7, 1968. *Williams* v. *Rhodes*, 393 U.S. at 26-27. Plaintiffs submit that the Maryland filing deadline of March 8, which falls only one month after the "unreasonably early" deadline in *Williams*, is equally unreasonable and should be rejected by this Court.

Williams also contains the second indication by this Court that unreasonably early filing deadlines are constitutionally infirm. In *Williams*, Ohio imposed a requirement that third parties have an organized party structure and conduct primaries in choosing their candidate. 393 U.S. at 25 & n.1. Ohio argued that only through the primary election process can the third party discern its most attractive candidate. *Id.* at 32-33. This Court rejected Ohio's arguments in the following language:

> The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies "will be given a choice of leadership as well as issues" since any leader who attempts to capitalize on the disaffection of such a group is forced to submit to a primary in which other, possibly more attractive, leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to

> some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well.
>
> *Id.* at 32-33.

The March filing deadline for independent candidacies in Maryland is unreasonably burdensome in a similar fashion. Mr. Bradley's testimony established that Maryland's early filing deadline required the institution of campaign and petition drive activities eighteen months prior to the general election. (A. 16A). During this early time period an independent candidate is forced to operate in a virtual void, since the important issues of the election have not galvanized and, more importantly, the identity of the independent's potential opponents is still unknown. (A. 16A). Further, the premature mandatory commencement date prevents a potential independent candidate from mounting a petition drive and independent campaign in response to an important issue which surfaces later in the election year or in response to a potential opponent who materializes during the primary election campaign. The potential independent candidate in Maryland must make his or her decision to run in a political vacuum. Accordingly, under the principles embodied in *Williams* v. *Rhodes, supra,* this constitutes a substantial burden on the exercise of constitutional rights.

The final indication provided by this Court that the March 8 filing deadline is constitutionally infirm appears in *Lubin* v. *Panish,* 415 U.S. 709 (1974). In discussing filing fees as a burden on constitutional rights, the Court took the opportunity to note the philosophical shift which is occurring in current political thought:

> Historically, since the Progressive movement of the early 20th century, there has been a steady trend toward limiting the size of the ballot in order to "concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." This desire to limit the size of the ballot has been variously phrased as a desire to minimize voter confusion, to limit the number of runoff elections, to curb "ballot flooding," and to prevent the overw' elming of voting machines—the modern counterpart of ballot flooding. A majority of States have long required the payment of some form of filing fee, in part to limit the ballot and in part to have candidates pay some of the administrative costs.
>
> In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expression of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965 reflect this shift in emphasis.
>
> 415 U.S.* at 712-73 (citations and footnotes omitted).

The Plaintiffs subscribe to this analysis and submit that the substantial burdens imposed on independent candidacies by the Maryland statutory scheme violate not only the spirit of recent political thought, but also the Constitutional rights of the Plaintiffs herein.

We believe the conclusion is inescapable, upon the evidence presented and the principles already enunciated by this Court, that the District Court properly concluded that the remote petition filing deadline imposed by the Maryland statutory scheme "substantially burdened the ability of Bradley to gain access to the ballot . . ." (AJS. 6a). With this finding, the burden shifts to the State to establish a compelling or vital State interest which is furthered by the early filing deadline and to establish that the means taken to protect that interest are the least restrictive means available. *See, e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Lubin* v. *Panish,* 415 U.S. 709 (1976).

C. The State Has Established No Compelling or Vital State Interests Justifying the Burdens Placed Upon the Exercise of Plaintiff's Rights.

Both in argument before the District Court below and on brief before this Court, the State has attempted to show that Maryland's remote filing deadline is justified by a variety of purported compelling state interests. Quite the contrary, however, the District Court fully and properly rejected the purported compelling state interests proferred to the District Court by the State. Furthermore, the alleged compelling state interests proferred by the State on brief are equally lacking in merit. Failure to establish a compelling state interest which is protected by the early filing

deadline requires that the burdensome March deadline be rejected by this Court. *See, e.g., American Party of Texas* v. *White,* 415 U.S. 767, 780 (1974); *Dunn* v. *Blumstein,* 405 U.S. 330, 342 (1972); *Bullock* v. *Carter,* 405 U.S. 134, 149 (1972). Each of the purported compelling or vital state interests will be considered *seriatim.*

First, it is suggested that the early March filing deadline is necessary in order to provide sufficient time for validation of the signatures appended to the petitions and to accommodate legal challenges to the determinations made by the State Administrative Board of Election Laws. Arguably, the State has an interest in determining within a reasonable time those names that will appear on the general election ballot so that the ballot and voting machines can be prepared for the general election in an orderly fashion. *See,* District Court Opinion, AJS. 6a. We readily admit that the orderly functioning of elections is a valid state interest. However, the March filing deadline does not further that interest. First, as the District Court properly recognized, the certification of candidates' names for placement on the general election ballot occurs in Maryland in late August. *See* District Court Opinion, AJS. 7a; § 8-4. Thus, it is only in late August that the fate of a potential independent candidate need be determined. As presently formulated, the Maryland statutes require that the validity of an independent's nominating petition must be determined in 35 days. *See* District Court Opinion, AJS. 7a. Thus, from an administrative standpoint, since the sufficiency of an independent candidate's nominating petition need not necessarily be determined earlier than late August, a filing deadline of mid-July for independent

candidates' petitions, a period of 35 days prior to late August, would still guarantee that the ballot certification take place in timely fashion. Further, from an administrative standpoint, it should be noted that the State Administrator of Election Laws admitted at the Hearing before the District Court that a July filing deadline for independent petitions would not create an impracticable administrative situation. (A. 63A). The final indication that a July filing deadline is not administratively burdensome is that in non-presidential election years, the filing date for independent candidates' petitions actually falls in July. (A. 62A). The proper functioning of the November general election is not a compelling or vital state interest which is protected by, or remotely related to, the March filing deadline.

A second purported vital state interest, reviewed by the District Court was the valid interest of a state in preventing a defeated primary candidate from utilizing the nomination by petition process to gain a place on the ballot. (AJS. 7a). Arguably, this could occur if a July deadline were placed on independent candidates and the party primary elections were held in May as is presently done in presidential election years. The defeated primary candidate could have two months to complete a petition drive as an independent. However, this possibility is precluded by a Maryland statutory provision which forbids the printing of a defeated primary candidate's name on the general election ballot for any office. § 8-2. Thus, the early filing deadline is not necessary to protect this state interest.

A third purported state interest requiring the determination of the sufficiency of the independent candi-

dates' nominating petitions in March is to foster "the intelligent exercise of the franchise by those voting in the primary, *i.e.*, that a voter in the primary can cast his vote more knowledgeably and effectively if he knows which independent candidates will or will not be on the final ballot." *See* District Court Opinion, AJS. 8a. The District Court properly discounted this alleged state interest by pointing out that a more significant factor to the intelligent exercise of the franchise at the primary election would be the identity of the opposing party's candidate for the general election. Since that person's identity remains unknown to the voters until after the primary election, the state interest in intelligent voting is not served by requiring that independent candidates be determined far in advance of the date of the primary election held for partisan candidates. *Id.*

At oral argument before the District Court, the State argued an additional purported compelling state interest, *i.e.*, the desirability of the state to treat partisan and non-partisan candidates alike. (Tr. 174-75). The District Court properly dismissed this spurious assertion since the Maryland statutory scheme most certainly does *not* treat partisan and independent candidates alike. *See* District Court opinion, AJS. 9a. In effect, the petition gathering process constitutes the primary election for the independent candidate—this is the mechanism by which the independent candidate gains a position on the general election ballot. Thus, March 8, 1976, which is the date for filing of certificates of candidacy by all candidates and the date for filing of independent candidates' petitions, marks the beginning of the primary contest for partisan candidates and the end of the primary contest for inde-

pendents. This is inherently *unequal* treatment and cannot be used to support an alleged compelling state interest that independents and partisan candidates be treated equally.

In its brief to this Court, the State suggests that four additional compelling state interests are present to justify the early March filing deadline. None of these additional proffered state interests survives the test of "exacting scrutiny" laid down by this Court.[12] *See Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

The first of the latest purported compelling state interests is that of protecting the electorate from "unscrupulous party candidates" who might support a petition drive of an independent candidate with a name or philosophy similar to that of an opponent. (Br. 35). The assumed ultimate effect would be that voters might be artificially siphoned off from the opposition candidate. (Br. 36). This argument deserves little attention. The attempt by the State to justify the early filing deadline on this premise reflects a cynicism of the political process and denigrates the sophistication of the Maryland electorate. Even if a so-called "name's-the-same candidate" (Br. 36) did gain ballot position in a Maryland election through "unscrupulous" behavior, no significant effect would result. The "name's-the-same candidate" would be branded as a sham candidate and any party candidate who prompted or fostered this tawdry conduct would be exposed to the ultimate detriment of his own campaign. Moreover, the probability of successful execution of election misconduct resulting in voter confusion as described by the State is negligible. The belated attempt of the State to justify its early filing deadline on this purported state interest fails.

[12] Indeed, their emergence at this stage of the proceedings suggests the hint of afterthought rather than of substance.

The second alleged compelling state interest relied upon in the brief of the State is the promotion of voter and candidate knowledge of all general election candidates at the same time. In explanation of this state interest the State quoted a section of the oral opinion of a three judge district court in *Auerbach* v. *Mandel* [13] which stated that the state has a legitimate interest in requiring that all candidates be known at the same time. (Br. 37). The Bradley District Court considered this qoute from *Auerbach* and stated that it was "pure dictum." *See* District Court Opinion, AJS. 11a. This description of the nature of the quotation relied upon by the State is particularly telling since Judge Winter authored both the *Auerbach* and *Bradley* opinions. He was thus in a uniquely advantageous position to evaluate the language of the *Auerbach* opinion. In addition to stating that the language from the *Auerbach* opinion was dictum, Judge Winter further observed quite correctly in *Bradley* that the Maryland filing requirement "does not permit all candidates to know all of their opponents at the same time." *See*, District Court Opinion, AJS. 11a.

The State also argues that indentification of all general election candidates simultaneously protects the rights of independent candidates who might be disadvantaged by remaining as uncertified candidates for

[13] No. 74-141-N (D. Md., March 3, 1972), *aff'd* 409 U.S. 808 (1972).

some time after the primary election [14] and protects the rights of the victors of partisan primary elections who might otherwise be surprised at finding a newly certified independent opponent in the field late in the election. The State argues that the filing deadline of March 8 with certification occurring in mid-April removes these possible dangers. (Br. 37-38). This position is nonsensical. First, it ignores the fact that, under the present statutory scheme, the independent candidate is always faced with unknown candidates on the date of his filing. There can be no compelling state interest in preserving this inequity. Second, the State can easily expedite the validation of signatures, just as it expedites the counting of votes. Finally, the likelihood of the success of the petition can be determined easily by those with a substantial interest in the outcome. Moreover, any ephemeral effect which may occur as a result of an independent candidate's certification being made after primary election is obviated by an alternative statutory scheme which was suggested by the Plaintiffs and recognized by the Court below. That alternative is discussed fully in Part I(C) of this Argument, *infra*.

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[14] The State cites as one example of the disadvantage experienced by an independent awaiting certification the difficulties that candidate will experience in collecting money. (Br. 38 and fn. 18). The State recites Mr. Bradley's testimony on affidavit that contributors were awaiting his certification before committing funds. Plaintiffs submit that Mr. Bradley's fundraising problems were distinguishable from the proposition propounded by the State. Mr. Bradley was not a candidate awaiting certification by the State Administrative Board of Elections Laws. Mr. Bradley was in a much more tenuous circumstance. He was a candidate who had been *denied* certification by the Board and who would become a candidate only as a result of this litigation.

The State submits as yet another purported vital state interest the need for full public discussion by all candidates during the primary election. We agree with this proposition and concur that a program which fosters public discussion is beneficial to the electoral process. However, an unreasonably early filing deadline is not only unnecessary to protect that interest, but, in fact, thwarts it. The State improperly concludes that only by an early filing deadline will public discussion be fostered.

It is axiomatic that any statewide independent candidate who at some time during the election year, whether before or after the primary, must gather in excess of 50,000 signatures on petitions, will take advantage of any opportunity to speak to the public on the issues of the campaign. If an independent candidate is running a petition drive, he or she will take every opportunity to gain exposure. As the State properly points out (Br. 38), Mr. Bradley did not take part in active discussion during the primary election campaign. But Mr. Bradley was not conducting a petition drive. He had been denied certification by the State Board of Election Laws and could gain access to the ballot only through the successful completion of major constitutional litigation. His position as a prospective candidate was, at very best, tenuous. Since he had been denied a position on the ballot, campaigning across the state would have been a futile act, at least until the May 17, 1976 District Court opinion in this case.

An independent candidate will reasonably take advantage of any public forum available to the candidate during the petition drive. In an attempt to foster public discussion, then, it is more rational to extend the pe-

tition gathering period to include the high political interest period of the primary election campaign, rather than to terminate the petition drive prior to that time period. The State's present statutory scheme subverts rather than fosters full public discussion.

The final alleged compelling state interest propounded by the State is that the present statutory scheme requiring independent candidates to file nominating petitions in early March in presidential election years allows Maryland voters to participate in an early presidential primary election which assumedly gives Maryland voters an increased role in the selection of presidential candidates. (Br. 39). The May presidential preference primary needs no protection from the Plaintiffs in this case. Neither this suit, the relief sought therein, nor the timing of the independent candidate's petition drive affects in any way the presidential preference primary date. This purported vital state interest is unrelated to independent candidacies.

No compelling or vital state interest has been presented by the State. Thus, the District Court properly found the early filing deadline to be in violation of Plaintiffs' constitutional rights.

D. The State Has Failed To Establish that the Remote Filing Deadline Is the Least Restrictive Alternative Available To Protect Any Valid or Compelling State Interest.

Even assuming *arguendo* that the State has proffered a valid or compelling state interest which is protected by the early filing deadline, the constitutional analysis is not at an end. The State must go further and establish that the actual means chosen to protect that interest, *i.e.*, the March filing deadline, is the alternative which places the least restraint on the exercise of con-

stitutionally protected liberties. *See, e.g., Elrod* v. *Burns,* — U.S. —, —, 96 S.Ct. 2673, 2684-85 (1976); *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 342-43 (1972). If any alternative means are available to protect the state's interest, the state may not choose the way of greater interference with constitutional rights. "If [the state] acts at all, it must choose 'less drastic means.'" *Dunn* v. *Blumstein, supra* at 343; *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). The State clearly has the burden of establishing its compelling state interests. The State also must carry the burden of establishing that the means chosen are the means least restrictive on the exercise of constitutional rights. *Cf. Elrod* v. *Burns, supra.*

The State, both here and before the District Court, failed to consider and balance the varying restrictions imposed on constitutional rights by available alternatives to the remote March filing deadline for independent nominating petitions. Indeed, the State posited no alternatives to its present statutory scheme.

The Plaintiffs consistently have suggested such an alternative. Assuming, for purposes of this discussion, that the State does have a valid or compelling interest in requiring that all candidates for the general election be identified simultaneously (Br. 36), an alternative statutory scheme is readily available which will protect this alleged state interest in a way less burdensome to guaranteed constitutional rights. The Plaintiffs suggested such a scheme before the District Court (Tr. 145-46, 155). Further, the District Court endorsed that proposed scheme. *See* District Court Opinion, AJS. 9a. The scheme provides that an independent candidate

would file his or her certificate of candidacy with the appropriate state officials at the same time as the filing by partisan candidates of their certificates. In 1976, that date was March 8, 1976. The independent candidate could be required to submit at that time, with the certificate, a nominal but not insubstantial number of registered voters' signatures, for instance 1,000 signatures for a statewide office. Then, during the pendency of the primary election campaign, the independent candidate could complete his petition drive. On primary election day, the independent candidate would file the remaining signatures of registered voters. Such a scheme fully protects all the alleged compelling state interest proferred by the State without substantially burdening the Plaintiffs' rights. The early filing of the independent's certificate of candidacy along with the nominal but not insubstantial number of signatures would cause all candidates for one office to be identified simultaneously. The Plaintiffs' proposed scheme would result in all candidates being treated equally. The proposed scheme would foster public discussion since the independent candidate can take advantage of increased voter interest in politics by making numerous public appearances and by utilizing increased media interest as the primary election campaign advances. Further, the proposed scheme would not open the doors to frivolous independent candidates since the independent must still garner the statutorily imposed total number of signatures. For statewide office in Maryland in 1976, that number was 55,155 signatures (A. 16A).

The benefits accruing to the independent candidate are clear. The independent candidate could complete the main portion of the petition drive in a time period during which voter and media interest peaks, during

which increased monetary and volunteer contributions could be expected, during which weather conditions are improved, and during which traditional politically oriented activity is high.

The State spoke briefly to this alternative proposal by the Plaintiffs and endorsed by the District Court. (Br. 37-38). The sole complaint raised by the State in its critique of the Plaintiffs' alternative scheme is that if the independent candidate files the major portion of the required signatures on primary election day, sufficiency of the number of those signatures might not be determined until the validation period had closed. Clearly there exist at least two methods to vitiate any purported difficulties created by this situation. First, the independent candidate could be required to certify on primary election day the gross number of signatures which he or she is submitting. From that number, an informed judgment could be made of the likelihood of the independent candidate's success. The average rate for invalidation of signatures would be applied to that gross number and a clear picture could be developed on primary election day of the possibility of the independent candidate's name appearing on the general election ballot. (A. 39A-40A). Second, in addition to requiring the independent candidate to certify the number of gross signatures presented, the local county election boards could be required to determine the gross number of signatures filed within several days of the primary election date. A mere counting of signatures would be necessary. No more time would be involved than, for example, a detailed count in a closely contested election. Then the identical analysis above described could be applied to that number and a clear picture of the independent's possibility of success could be made.

Based on that clear picture, partisan candidates, the media, potential contributors and the independent candidate could rely on this informed judgment in planning activities during the brief intervening 35 day period from the primary election date to the date for certification of the independent candidate.

The Plaintiffs' proposed statutory scheme is a workable alternative which protects the alleged interests of the State and grants the independent candidate the fullest exercise of constitutional rights.

The State has failed to establish the existence of a valid or compelling state interest requiring protection by means of the early filing deadline. Further, assuming *arguendo* that such an interest has been established, the State has failed to show that the early filing deadline for independent nominating petitions is the least restrictive alternative which is available to protect that interest.

The District Court properly found that the early filing deadline of § 7-1(e) [15] violated Plaintiffs' constitutional rights.

II. THE BRADLEY DISTRICT COURT PROPERLY APPLIED THE PRINCIPLES ENUMERATED IN HICKS v. MIRANDA IN RELYING UPON A DISTRICT COURT OPINION WHICH HAD BEEN SUMMARILY AFFIRMED BY THE SUPREME COURT.

Salera v. *Tucker* [16] is a case decided originally by the Federal District Court for the Eastern District of Pennsylvania which determined that certain portions of the Pennsylvania election laws violated the United

[15] The early filing deadline provisions of § 7-1(e) are presently contained in § 7-1(i). *See*, fn. 1, *supra*.

[16] 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976).

States Constitution. *Salera* was appealed to the Supreme Court of the United States where it was summarily affirmed. The *Bradley* District Court examined *Salera* in light of the summary affirmance principles enunciated in the Supreme Court's Opinion in *Hicks* v. *Miranda*.[17] The *Bradley* District Court determined that the summary affirmance of *Salera* was binding and *Salera* was applied to the factual situation extant in the *Bradley* litigation. Plaintiffs submit that the *Bradley* District Court properly applied the principles enumerated in *Hicks* and that the *Bradley* District Court correctly relied upon *Salera* in deciding the case below.

Hicks is a recent case which restated this Court's position that a summary affirmance by this Court is a decision on the merits of the litigation below. 422 U.S. at 343-44. This jurisprudential principle of the treatment of summary affirmances has been recognized by this Court in the past. *Ohio ex. rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959). Further, this principle has been very recently re-affirmed. *Usery* v. *Turner Elkhorn Mining Co.*, — U.S. —, —, 49 L.Ed.2d 752, 765 (July 1, 1976). This treatment of summary affirmance has similarly been applied broadly by lower Federal Courts. *See, e.g., Brady* v. *State Bar of California*, 533 F.2d 502, 503 & n.1 (9th Cir. 1976); *Ingraham* v. *Wright*, 525 F. 2d 909, 918 (5th Cir.), *cert. granted on other grounds*, —, U.S. —, 48 L.Ed.2d 815 (May 24, 1976); *Thonen* v. *Jenkins*, 517 F.2d 3, 7 (4th Cir. 1975).

The State does not attack the teachings of *Hicks;* rather it argues that the *Bradley* District Court improperly applied *Hicks*. (Br. 39-45). Plaintiffs submit that the State is in error in this proposition.

[17] 422 U.S. 332 (1975).

In its *Hicks* analysis of *Salera*, the *Bradley* District Court indicated that *Salera* was binding authority in the case only if *Bradley* and *Salera* are factually indistinguishable and if it could be fairly said that *Salera* decided the issue before the *Bradley* District Court. *See* District Court Opinion, AJS. 8a.

Plaintiffs submit that the *Salera* decision cannot be distinguished in any meaningful manner from the facts extant in *Bradley*. The State argues that the cases are distinguishable since the Pennsylvania election provisions contained burdens in addition to an unreasonably early filing deadline and that the totality of the burdens in *Salera* caused the statutory scheme to be declared unconstitutional. (Br. 43-44). The Plaintiffs submit, however, that the unconstitutionality of the Pennsylvania filing deadline which fell 218 days before the general election was the sole issue decided by *Salera*.

In *Salera*, the plaintiffs challenged certain provisions of the Pennsylvania Election Code on two principal bases. The first general claim alleged that a 3-week limitation on gathering signatures for nominating petitions for an independent candidate was a violation of the Fourteenth Amendment. The three-judge court rejected this claim, holding, on the basis of *Storer* v. *Brown*, 415 U.S. 724 (1974), that, "the three-week period is constitutional as applied to plaintiffs." 399 F. Supp. at 1265.

The court then passed on to the second claim of the plaintiffs—that a requirement for filing signatures on nominating petitions on a date far in advance of the general election was constitutionally impermissible. There can be no doubt that the court divorced the two issues completely, and in no way treated them on a

theory of "totality." In this regard, the *Salera* court stated:

> The second half of plaintiff's challenge to § 2913 (b) and § 2913(c)—that the period for gathering signatures on nominating petitions is so remote from the general election that it substantially impairs plaintiffs' ability to appear on the ballot or to vote for otherwise qualified candidates—*raises different issues than were raised by plaintiffs' challenge to the three-week limitation.* 399 F. Supp. at 1266 (emphasis added).

Following this express severing of the two issues, the court in *Salera* went on to hold that a requirement for filing signatures on petitions by a date far removed from the general election was unconstitutional. 399 F. Supp. at 1269. According to the clear words of the *Salera* decision itself, *Salera* was a one issue case. The *Bradley* District Court so found. (AJS. 9a).

An examination of the Pennsylvania and Maryland election codes, insofar as they relate to the timing of the filing of nominating signatures, thus becomes crucial. In *Salera*, the Pennsylvania Election Code required that the signatures be filed 218 days before the general election and 49 days before the primary election. 399 F.Supp. at 1266. Under the Maryland Election Code, the nominating signatures for independent candidates are required to be filed 239 days before the general election and 70 days before the party primary election. Since the sole issue decided in *Salera* was that the filing deadline for independent nominating petitions was unreasonably early, and since the Maryland filing deadlines fall even earlier than those in *Salera*, the *Salera* situation is indistinguishable from the *Bradley* case.

From this determination, the *Bradley* District Court went to a second analytical level and determined what issue was presented to the Supreme Court in its summary affirmance in *Salera*. The *Bradley* District Court examined the jurisdictional statement filed by the Commonwealth of Pennsylvania and the motions to affirm filed by the various plaintiffs in *Salera*. *See,* District Court Opinion, AJS. 8a. Although the jurisdictional statement and motions to affirm noted in passing the three-week period for the collection of signatures, the *Bradley* District Court noted that none of the papers filed with the Supreme Court argued that the result reached in *Salera* was based either in whole or in part on the three-week collection period. *Id.*

The *Bradley* District Court determined on the bases of the dichotomized nature of the *Salera* opinion and the content of the *Salera* jurisdictional statement and motions to affirm, that one and only one issue was presented to the Supreme Court for its ultimate determination to summarily affirm. That issue was the unreasonably early filing deadline.

The *Bradley* District Court's dual level of analysis is clearly suggested by the Supreme Court's own analysis of a prior summary affirmance. In *Gibson* v. *Berryhill*,[18] the Supreme Court examined the jurisdictional statement and motion to affirm filed in *Geiger* v. *Jenkins*,[19] a case which the Supreme Court had summarily affirmed earlier, to determine the factual situation existing in the earlier case. 411 U.S. at 576. The Supreme Court then analyzed *Geiger* for possible bases

[18] 411 U.S. 564 (1973).

[19] 401 U.S. 985 (1971).

upon which to distinguish it from the litigation the Court was then considering. 411 U.S. at 576-77. This is the precise analysis undertaken by the *Bradley* District Court in its consideration of the *Salera* opinion. That analysis properly implemented the principle enunciated in *Hicks* v. *Miranda, supra.*

The State argues on Brief that the *Bradley* District Court did not take full cognizance of the import of three prior Supreme Court summary affirmances of district court cases which involved § 7-1(e) of the Maryland Election Code. *See Auerbach* v. *Mandel,* Civ. No. 74-141-N (D. Md., March 3, 1972), *aff'd* 409 U.S. 808 (1972); *Maryland People's Party* v. *Mandel,* Civ. No. 72-865-K (D. Md., Sept. 5, 1972), *aff'd* 410 U.S. 901 (1973); *Wood* v. *Putterman,* 316 F. Supp. 646 (D. Md.), *aff'd* 400 U.S. 859 (1970). However, none of these cases presented to the Supreme Court the issue of the constitutionality of the early filing deadline.

Auerbach v. *Mandel, supra,* was relied upon heavily by the State in arguing that the Supreme Court has approved by summary affirmance the early filing deadlines imposed by Maryland. (Br. 37). Despite the fact that the *Auerbach* District Court did comment on the burdens imposed by the early filing deadline, the constitutionality of that provision was not decided in *Auerbach.* The *Auerbach* District Court stated:

> Now having stated our views as a matter of statutory construction, it seems to us that there is no constitutional question which the suit of the People's Party raises, and as a consequence, we find no basis for giving relief in accordance with the prayers set forth in that complaint.
>
> Jurisdictional Statement, *Auerbach* v. *Mandel,* No. 71-1592, at 29.

The *Auerbach* District Court then went on in dictum to comment upon Maryland's early filing deadline. The *Bradley* District Court considered the *Auerbach* comment on the filing deadline and branded it as pure dictum. *See* District Court Opinion, AJS. 11a. The *Bradley* District Court was in a uniquely knowledgeable position to comment upon the weight to be given the *Auerbach* comments. Two of the members of the *Auerbach* three judge panel were members of the *Bradley* panel. In addition, the author of the *Bradley* opinion, who described relevant portions of the *Auerbach* opinion as pure dictum, authored the *Auerbach* opinion as well. The *Bradley* District Court correctly concluded that the Supreme Court did not summarily affirm this dictum and was correct in concluding that *Auerbach* was not binding law on the constitutionality of Maryland's early filing deadline.

Maryland People's Party v. *Mandel, supra,* involved issues identical to those presented in *Auerbach.* The *Maryland People's Party* District Court dismissed the complaint based solely upon the Order and Opinion in *Auerbach. See Maryland People's Party* v. *Mandel,* Order, No. 72-524, Jurisdictional Statement 8a. Thus, *Maryland People's Party,* like *Auerbach,* failed to present to this Court for summary affirmance the issue of the constitutionality of the early filing deadline.

Finally, *Wood* v. *Putterman, supra,* did not consider either the issue of independent candidacies or the burdensome nature of early filing deadlines. *Wood* involved the ability of a local county political party to qualify as a "party," with the ability to nominate candidates by means of a party primary or primary meeting. 316 F.Supp. at 648. The statutory filing

deadlines were merely referred to in dicta. *Id.* at 649. The jurisdictional statement in *Wood* did not raise for this Court's determination on summary affirmance the issue of the constitutionality of the early filing deadlines for independent candidates. *See Wood* v. *Putterman,* No. 70-704, Jurisdictional Statement.

None of the prior summary affirmances submitted by the State as evidence that this Court had determined the constitutionality of Maryland's early filing deadline presented that issue to this Court for determination. The *Bradley* District Court properly discounted the precedential effect and binding nature of this Court's summary affirmances in *Auerbach, Maryland People's Party* and *Wood.* In making its decision below, the *Bradley* District Court scrutinized the *Salera* decision and the various papers filed before this Court in *Salera.* Further, the *Bradley* District Court reviewed and properly discounted all prior summary affirmances which involved in any alleged manner the early filing deadline for independent candidates in Maryland. The *Bradley* District Court deemed itself bound by this Court's summary affirmance of *Salera. See* District Court Opinion, AJS. 12a. Plaintiffs concur in that determination.

CONCLUSION

The decision below is manifestly correct and can be affirmed on either of two grounds. First, the District Court was bound by this Court's summary affirmance of *Salera* v. *Tucker, supra.* The *Bradley* District Court keenly scrutinized *Salera* and other decisions of this Court relating to the Maryland filing deadline for independent candidates' nominating petitions. On this analysis, the District Court properly found that it

was bound by the legal determination made in *Salera* under this Court's teaching in *Hicks* v. *Miranda, supra.*

Second, the *Bradley* District Court undertook a traditional constitutional analysis of Maryland's statutory scheme. The *Bradley* District Court determined that the early filing deadline substantially burdened the rights of the Plaintiffs herein and that the deadline was not justified by any compelling or vital state interest. Further, even assuming that a compelling state interest was established, the State failed to show that the means chosen to protect that interest placed the least restrictions possible on the exercise of constitutional rights.

Plaintiffs submit that the provisions of § 7-1(e) of the Maryland Election Code, now codified at § 7-1(i)[20] violate the rights of the Plaintiffs as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and that the decision of the District Court should be affirmed.

Respectfully submitted,

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[20] See fn. 1, *supra.*

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF
THREE JUDGES FOR THE DISTRICT OF MARYLAND

REPLY BRIEF FOR APPELLANTS

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APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

REPLY BRIEF FOR APPELLANTS

INTRODUCTION

When examined in light of the record in this case and the State's arguments for upholding Maryland's candidate filing deadline, Appellees' principal contentions do not withstand scrutiny. Their Brief is marked by contradictions, omissions, errors and unsupported assumptions.

For example, Bradley and his supporters rely throughout their Brief on the lower court opinion, which held that Maryland's candidate filing deadline *standing by itself* was unconstitutional. Yet their arguments reveal an attack upon other specific features of State election law which are clearly constitutional. They now

claim to be aggrieved because (1) Maryland requires independent candidates to gain access to the general election ballot by gathering signatures rather than by battling opponents in a primary (Appellees' Brief at 3, 29-30); (2) because State law requires an independent to gather signatures totaling three percent (3%) of registered voters (Appellees' Brief at 21, 22, 36); and (3) because Statewide candidates understandably must generate proportionately greater popular support than local candidates to obtain general election ballot access (Appellees' Brief at 21, 22, 36). Yet this Court has rejected such grievances by independent candidates in the past. *Storer v. Brown,* 415 U.S. 724, 740 (1974); *Jenness v. Fortson,* 403 U.S. 431 (1971) at 440. In essence, Appellees' Brief is marked by indirect attacks on what can not be attacked directly. But rather than rehash all of Appellees' inconsistencies, the State will focus its Reply Brief on questions that merit special attention.

ARGUMENT

I.

APPELLEES HAVE FAILED TO DEMONSTRATE THAT SECTION 7-1(e) EXCESSIVELY BURDENS THEIR RIGHTS OR UNCONSTITUTIONALLY DISCRIMINATES AGAINST INDEPENDENT CANDIDATES.

One major fallacy in Appellees' argument is their attempt to place the principal or exclusive blame for the initial failure of the Bradley petition filing on Maryland's statutory filing deadline. Inconceivably, Appellees would have this Court believe that the invalidation of 11,190 of the 53,239 signatures proffered by the filing deadline (some 2,000 more than needed to qualify under Maryland law for access to the general election ballot) was somehow caused by the Section 7-1(e)[1] deadline

[1] As Appellants noted in their Brief, Section 7-1(e) was amended effective July 1, 1976, so that the filing deadline of that statute now appears as Section 7-1(i). Because the lower court's opinion and order and the State's notice of appeal were filed before the effective date of the change, Appellants have referred to the statutory provisions whose constitutionality is at issue as Section 7-1(e).

rather than the inefficiency of their signature-gathering campaign. Bradley's simplistic "but for" reasoning ignores the fact that but for these invalidations, but for the fact that Bradley was a political unknown, but for the lack of a stronger campaign organization, but for the mistakes of his petition-gatherers, but for the lack of an earlier start to his signature gathering effort, the candidate would have obtained a place on the November ballot without court intervention.

In addition, Bradley assumes that the burdens of an independent candidate's route to the general election ballot in Maryland are inherently greater than those of party primary candidates. Based upon this assumption, he asserts that independents must be afforded advantages not available to party candidates. This is clear from Appellee's proffered "least restrictive alternative," i.e., his proposed rewriting of the Maryland filing deadline. In effect, Bradley would push back the date an independent's candidacy becomes perfected and official until the date of the primary plus 35 days for signature verification plus an additional time for notification and possible administrative and legal challenges. What legitimate or compelling interest can the State assert when a primary victor challenges this favoring of late blooming independent candidacies as a denial of equal protection?

Finally, Appellees' assumptions and their reliance on them run counter to the stringent showing this Court has stated to be necessary to invalidate ballot access restrictions. See *Storer v. Brown, supra,* at 730.[2] Rather than assume the burdens of the Section 7-1(e) filing

[2] In Storer, this Court said that its test for determining the validity of such provisions is not "self-executing" and that only "excessively burdensome" restrictions call into play constitutional scrutiny. *Id.* at 730, 738.

deadline, this Court should focus on the "open quality" of Maryland's ballot access laws, the demonstrable evenhandedness of their operation and the insubstantiality of the alleged disadvantages suffered by Bradley as a result of the deadline. Such a focused analysis can only lead to the conclusion that Appellees have failed to show that the Section 7-1(e) filing deadline excessively burdens their rights or unconstitutionally discriminates against independent candidates.

II.

THE NUMEROUS STATE INTERESTS ASSERTED IN SUPPORT OF SECTION 7-1(e) MORE THAN JUSTIFY WHATEVER BURDENS OR DISCRIMINATION THAT MAY BE SAID TO ARISE FROM MARYLAND'S CANDIDATE FILING DEADLINE.

Even assuming that the burdens of Maryland's candidate filing deadline on independent candidates are "excessive" and that the statute's effect is in some way discriminatory, Section 7-1(e) is amply supported by important State interests. Despite Bradley's assertion to the contrary (Appellees' Brief, p. 30), all of these interests were raised below and discussed extensively in the State's Memorandum of Law. And, although Appellees attempt to create straw men by rehashing and attacking the State interests rejected by the three-judge panel in *Salera* (Appellees' Brief, pp. 27-29), Maryland's justifications for its candidate filing deadline both here and in the lower court are substantially different and more weighty than those asserted by Pennsylvania.

Appellees mischaracterize and misunderstand the "equal treatment" rationale for the State's simultaneous filing deadline for independent and party candidates. Undeniably, independent and party candidates do not follow the same route to obtain access to the general election ballot.[3] But such candidates are treated

[3] Nor does the Constitution require the State to permit both candidates to follow the same route. See *Jenness v. Fortson*, *supra*, at 440-41.

"equally" in that neither is given an unfair advantage over the other. (See Appellants' Brief, pp. 30-35; 37-38). Secondly, Bradley belittles the State's asserted interest in fostering the integrity of the electoral process by the uniform filing deadline, see *Jenness v. Fortson*, *supra*, at 442, by naively assuming that sham independent candidacies promoted by a party candidate to siphon votes would be "branded . . . and exposed to the ultimate detriment of his own campaign" (Appellees' Brief, p. 30). However, Maryland's 1975 experience with such sham candidacies demonstrates to the contrary.[4]

In challenging another of the State's legitimate interests, viz., that of fostering public discussion among *all* candidates during the primary, Bradley makes a similar misstatement. Appellees suggest in their Brief that the reason Bradley did not engage in public debate during the primary campaign was because he had been denied certification by the State Board (Appellees' Brief, p. 33). However, candidate Bradley was silent not only after that denial, but also during the entire 37 day period between the March 8 filing date and his notification on April 15 that he had not qualified for the general election ballot.

Finally, Appellees denigrate the State's interest in preserving the right of Maryland voters to be heard at an early point in a Presidential election year as to their

[4] Prior to the September 1975 Baltimore City primary, City Councilmanic candidate Norman Reeves brought suit to keep a political unknown named James Reeves off the primary ballot. A Circuit Court judge, finding that the entry of the "name's the same" candidate into the race was part of a scheme to siphon off votes from Norman Reeves, granted the requested injunctive relief. On appeal and in the face of arguments that such relief could not be granted in the absence of a statute or actionable fraud, the Maryland Court of Appeals reversed. Reeves v. Reeves, 275 Md. 599 (1975). Subsequently in the primary Norman Reeves lost the election to two successful incumbents by 530 and 808 votes, respectively. James Reeves polled 1,523 votes.

choice for Presidential nominees (Appellees' Brief, p. 34). What Bradley fails to realize is the obvious fact that under Maryland's election scheme, were it not for the necessity of an early Presidential primary, the filing date for all candidates would occur in July (120 days before the general election).[5] The Presidential Preference Primary is the raison d'etre of the March filing date. However, if Appellees prevail, the State will face an array of cruel choices: (1) move the date of its Presidential Preference Primary back to July, by which time the Presidential nominees may already have been determined; (2) hold two separate primary elections at different times; or (3) abandon its present evenhanded system for one of disparate filing dates for independent and party candidates. Nothing in the Constitution requires the State to make such a choice.[6]

III.

THE PRECEDENTIAL VALUE ACCORDED *SALERA v. TUCKER* BY APPELLEES AND THE LOWER COURT IS NOT SUPPORTED BY *HICKS v. MIRANDA* AND IS INCONSISTENT WITH *FUSARI v. STEINBERG.*

The unstated premise of Bradley's discussion of *Hicks v. Miranda,* 422 U.S. 332 (1975) is that a summary

[5] A filing deadline of 150 days before the general election was upheld in Jenness v. Fortson, *supra.*

[6] For these same reasons, Appellees' proffered "least restrictive alternative" to the Section 7-1(e) filing deadline should be rejected. Bradley's rewriting of the Maryland statute would require the State to abandon clearly legitimate and constitutional features of its election law, viz. a one-time three percent of the vote signature gathering requirement, a simultaneous filing date, a 35-day period to validate signatures (see Appellees' Brief, p. 35). In addition, what was proven to be an evenhanded and workable system must be scrapped for a complex scheme that places greater burdens on all candidates and may unfairly discriminate against party candidates (Appellants' Jurisdictional Statement, at 26). As this Court noted in Rosario v. Rockefeller, 410 U.S. 752, 762 n. 10 (1973), the concept that a State should use the least restrictive means to achieve its desirable goals "does not require that the State choose ineffectual means."

affirmance must be read by lower courts as an engine of destruction of prior written and summary decisions and thus of the established doctrine of the Supreme Court. However, this Court has indicated that while it may be a decision on the merits, *Tully v. Griffin, Inc.,* ___ U.S. ___, 50 L. Ed. 2d 227 (1976), a summary affirmance is not as binding as a written opinion of this Court. *Id.* at 233. *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). Nor can a summary affirmance be read as a renunciation of doctrine previously announced by this Court. *Fusari v. Steinberg,* 419 U.S. 379, 391-92 (1975) (concurring opinion of Chief Justice Burger).[7]

Moreover, this Court has never treated all summary affirmances with equal weight and dignity. Some are never cited again. Others are quickly cast aside. See, e.g., *National Independent Coal Operators Ass'n v. Brennan,* 419 U.S. 955 (1974). However, some summary affirmances when cited or discussed in subsequent written opinions may become important and influential. See, e.g., *Starns v. Malkerson,* 401 U.S. 785 (1971), discussed in *Vlandis v. Kline,* 412 U.S. 441 (1973) and *Weinberger v. Salfi,* 422 U.S. 479 (1975). In this last category of summary affirmances, which this Court has accorded the most influence, is *Auerbach v. Mandel,* 409 U.S. 808 (1972). In this Court's last written opinion on independent candidacies, *Storer v. Brown, supra, Auerbach* was cited as illustrative of a nomination by petition scheme whose constitutionality was sustained by this Court. This should have served as a warning light to the lower court in *Bradley* that it was not free to speculate that the only issue decided by this Court in *Auerbach* was one of statutory construction (AJA 10a-11a) and in effect redecide the 1972 decision of this Court.

[7] This question is also discussed in Sidle v. Majors, ___ U.S. ___, 50 L. Ed. 2d 316 (1976) (dissenting opinions of Justices Brennan and Marshall); and Colorado Springs Amusements Ltd. v. Rizzo, 96 S. Ct. 3228 (1976) (dissenting opinion of Justice Brennan).

But aside from the issue of whether *Auerbach* and the other numerous summary affirmances of this Court sustaining filing deadlines such as Section 7-1(e) are still good law after *Salera*, one thing is clear — a summary affirmance in *Salera* could not have overturned, *Jenness v. Fortson, supra*, and *Williams v. Rhodes*, 393 U.S. 23 (1968), as the lower court has in effect held.

As noted earlier, the *Bradley* court based its decision primarily on the alleged hardships of a 70-day pre-primary filing deadline. Yet in *Jenness*, a written opinion, a 69-day preliminary filing deadline was sustained. In *Williams*, a written opinion, a filing deadline of nine months before the general election was treated as only one of a number of features of a state law regulating ballot access to be gauged in combination in determining the law's constitutionality.[8] Yet the *Bradley* court examined the Section 7-1(e) filing deadline in isolation in its belief that such was required by *Salera*. Nothing in *Hicks v. Miranda* would authorize lower courts to negate this Court's written decisions in such a fashion. Moreover, such a result that turns this Court's silence into dogma could have been easily avoided if the lower court had applied the principles articulated in the ballot access opinions of this Court rather than its perception of the lower court opinion in *Salera*. The *Bradley* court, consistently with *Hicks*, could have relied on *Auerbach*, a summary affirmance involving the statute at issue in this case that is entirely in accord with written decisions of the Supreme Court. Instead, it chose to rely on a decision scrutinizing the ballot access statute of another state and to heighten the tension between written Supreme Court decisions and *Salera*. It was precisely this kind of lower

[8] Sweetenham v. Gilligan, 409 U.S. 942 (1972) emphasizes this point. Therein, a February filing deadline which was not coupled with other onerous features like those present in Williams was upheld as constitutional.

court action which was condemned by this Court in *Fusari v. Steinberg, supra*. In that case, a three-judge District Court in Connecticut relied on a 1972 summary affirmance of a three-judge court decision involving the question of whether New York's unemployment compensation scheme was in conflict with a federal law requiring benefits to be paid out in a timely fashion ("when due"), *Torres v. New York State Dept. of Labor*, 405 U.S. 949 (1972). The three-judge panel read the *Torres* summary affirmance broadly so as to foreclose its inquiry into the federal statutory question presented — a result this Court said would fly in the face of a written Supreme Court decision, viz. *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971):

> "The District Court interpreted our summary affirmance in *Torres* to indicate that benefits are not 'due' under § 303 until administratively deemed payable. 364 F. Supp. at 930. While this is a plausible reading of the evolution and affirmance of *Torres*, it is not one that we can endorse. *Such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits.* See 402 U.S. at 130-133, 91 S. Ct. at 1353-1354. *By reading our summary affirmance in Torres at its broadest, the District Court heightened the tension between that judgment and our more considered disposition of Java. A narrower interpretation of Torres would have been appropriate.*
>
> *"Any statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications. In this instance many of the factual distinctions that the District Court relied on to distinguish Torres on the constitutional issue apply equally to the 'when due' question.* For example, the delay in resolving administrative appeals is considerably greater in Connecticut than in the New York system, where administrative appeals

were resolved in an average of 45 days. See Torres v. New York State Department of Labor, 321 F. Supp. 432, 439 (SDNY 1971). And as the District Court observed, the *Torres* court apparently did not consider the probable accuracy of the challenged procedure in determining whether it adequately assured delivery of benefits 'when due.' See *Steinberg*, 364 F. Supp. at 936. We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. *We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case."* 419 U.S. at 589. (Emphasis added).

CONCLUSION

In summary, the State contends that *Salera* should have been given a narrower reading by the District Court, that the opinion of the three-judge court in Pennsylvania should not have been equated to the words of this Court, and that the lower court erred in failing to rely on the numerous written and summary decisions of this Court which support the constitutionality of Maryland's candidate filing deadline.

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